Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS.

81-2105

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MIZELL, WARDEN
Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TYRONE C. FAHNER
Attorney General
State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

RONALD LEE BELL
Assistant Attorney General
Of Counsel.

Printed by the Authority of the State of Illinois — 5-11-82

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines permitting denial of parole based upon the "seriousness of the offense" in a manner inconsistent with the ex post facto clause of the Constitution, where a prior statute granted Illinois parole authorities unfettered discretion in issuing paroles.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	7
Reasons For Granting the Petition	10
Conclusion	32
Appendices	1a *et seq.*

TABLE OF AUTHORITIES

CASES:	PAGE
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	25
Burbank v. Franzen, No. 80 C 3325 (N.D. Ill.)	13
Crowell v. Benson, 285 U.S. 22 (1936)	25
DeParolta v. Garrison, 575 F.2d 440 (9th Cir. 1975)	23
Garcia v. Parole Board, 557 F.2d 100 (7th Cir. 1977)	16, 24, 29, 30
Geraghty v. United States Parole Commission, 579 F.2d 238 (3d Cir. 1978), *vacated and remanded on other grounds*, 445 U.S. 388 (1980)	27
Graham v. McCombs, No. 82 C 3100 (N.D. Ill.)	13
Greenholtz v. Inmates of Nebraska Penal Correctional Complex, 442 U.S. 1 (1979)	16, 17
Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) (leave to appeal denied January 30, 1981)	12, 15, 21, 31
Heriens v. Mizell, No. 81-335 (S.D. Ill.)	13
In re Evans, 452 F.2d 1239 (D.C. Cir. 1971)	25
Marshall v. Garrison, 654 F.2d 440 (4th Cir. 1981)	23
Overall v. Director, No. 74 C 2541 (N.D. Ill. 1974), *affirmed without opinion*, 513 F.2d 634 (7th Cir. 1975)	12, 16, 21
People v. Harper, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975)	12, 21

People v. Kinney, 30 Ill. 2d 201, 195 N.E.2d 651 (1964) 22

People v. Lillie, 79 Ill. App. 2d 174, 223 N.E.2d 718 (5th Dist. 1967) ..... *passim*

People v. Moore, 133 Ill. App. 2d 827, 272 N.E.2d 270 (5th Dist. 1971) 16, 17

People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) 13

People v. Welsh, 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975) 1

Rodney v. Fairman, No. 82-2085 (C.D. Ill.) 13

Sanders v. Illinois Prisoner Review Board, No. 81-1235 (S.D. Ill.) 13

Shepard v. Tayler, 556 F.2d 648 (2d Cir. 1977) 23

United States ex rel. Butler v. Fairman, No. 82-2031 (C.D. Ill.) 13

United States ex rel. Cambell v. Pate, 401 F.2d 55 (7th Cir. 1968) 23

United States ex rel. Heriens v. Irving, No. 81-1014 (S.D. Ill.) 13

United States ex rel. Mallett v. Warden, No. 82 C 1295 (N.D. Ill.) 13

Ware v. Kaufmann, No. 80 C 3204 (N.D. Ill. 1981) 12, 13

Warren v. United States Parole Commission, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 50 L.W. 3669 (February 22, 1982) ..... *passim*

Weaver v. Graham, 450 U.S. 24 (1981) 22

Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) ..... *passim*

Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979) 30

CONSTITUTIONAL PROVISIONS:

United States Constitution, Art. 1, Section 10, Clause 1 ..... *passim*

United States Constitution, Tenth Amendment 29, 31

Illinois Constitution of 1870: Art. II § 11 ..... 3, 16, 18

Illinois Constitution of 1970: Art. I § 11 ..... 3, 16

STATUTES:

Ill. Rev. Stat. 1962, ch. 38, § 801 ..... 4, 12, 23, 28

Ill. Rev. Stat. 1962, ch. 38, § 807 ..... *passim*

Ill. Rev. Stat. 1967, ch. 108, § 203 20,21

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) ..... *passim*

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(f) 6, 7, 11

Ill. Rev. Stat. 1979, ch. 38, § 1005-5-3.1(8)-(10) 18

Ill. Rev. Stat. 1979, ch. 38, § 1005-5-3.2(7) 18

Cal. Admin. Code Title 15 § 2281 13

Col. Rev. Stat. 1979 § 16-11-203(1)(c) 13

Gen. Stat. of N.C. § 15A-1571 13

New Mexico Ann. ch. 31 § 21-19 13

R.I. Gen. Laws. § 13-8-14 13

18 U.S.C. § 501.4 23

18 U.S.C. § 4203(a) 29

MISCELLANEOUS:

State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (October 1962; effective June 1, 1962) ..... *passim*

Prisoner Review Board, *Rules Governing Parole*, 1978 ..... *passim*

Theodore P. Fields, *Illinois Parole and Pardon Board Adult Parole Decision*, 62 Ill. B.J. 20 (1973) ..... *passim*

Norval Morris, *The Future of Imprisonment* (1974) 19

A. von Hirsh, *Doing Justice* (1976) 19

H.M. Hart, Jr., "The Aims Of The Criminal Law" 23 Law and Contemporary Problems 401 (1958) 19

H.L.A. Hart, *Punishment and Responsibility* (1968) 19

Comment "The Parole System" 120 U. Pa. L. Rev. 282 (1971) 20, 21

C. Sand, *Sutherland on Statutory Construction* (4th ed. 1973) 25

Gibbs, *Crime, Punishment, Deterrence* (1976) 21

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MIZELL, WARDEN
Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which held that the application of the 1973 parole guidelines to a person who committed a crime in 1962, when there existed an unguided parole scheme, contravened the ex post facto clause. *Welsh v. Mizell*, No. 80-1862 (7th Cir. Jan. 12, 1982). (See Appendix A)

On June 21, 1973, after spending more than 10 years in a mental institution, the respondent was convicted of the rape and murder of a three year old girl. Respondent was sentenced to serve 60 to 100 years in a state penitentiary for a crime that took place in September, 1962. *People v. Welsh*, 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975).

Respondent filed a Petition for Writ of Habeas Corpus with the federal district court in the Southern District of Illinois on March 12, 1980. In his petition he claimed that his constitutional rights under the ex post facto clause were violated in that he was denied parole based upon a criterion (i.e., that his release would deprecate the seriousness of his offense and promote disrespect for the law) which he claims was not in existence at the time he committed his offense.

The district court dismissed the petition on May 22, 1980. A copy of that court's opinion is attached as Appendix B. On January 12, 1982, the court of appeals reversed the judgment of the district court and remanded the case back to the Prisoner Review Board (formerly the Parole and Pardon Board). A copy of that court's opinion is attached as Appendix A. The court of appeals denied the People's petition for rehearing and suggestion for rehearing *en banc* on February 10, 1982. (See Appendix C)

JURISDICTION

The court of appeals' decision was rendered on January 12, 1982. A petition for rehearing was denied February 10, 1982. This petition is being filed within 90 days of the date the court of appeals denied the petition for rehearing as per 28 U.S.C. 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Article 1, Section 10, clause 1 of the United States Constitution provides, in pertinent, part, that, "(N)o State shall . . . pass any . . . ex post facto law . . . ."

Amendment X of the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article II, § 11 of the Illinois Constitution of 1870 provides that:

> All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate nor shall any person be transported out of the state for any offense committed within the same.

Article I, § 11 of the Illinois Constitution of 1970 provides that:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Ill. Rev. Stat. 1962, ch. 38, sec. 801 provides, in pertinent part, that:

> § 1. Every person sentenced and committed to the penitentiary shall, in the discretion of the Parole and Pardon Board, be eligible to parole under rules and regulations adopted therefor by the Parole and Pardon Board, such paroles to be as follows: A person sentenced for life may be eligible to parole at the end of 20 years; a person not sentenced for life but sentenced for a definite term of years shall not be eligible to parole until he has served the minimum sentence provided by law for the crime of which he was convicted, good time being allowed as provided by law, not until he has served at least one-third of the time fixed in said definite sentence; a person sentenced for an indeterminate term shall not be eligible for parole until he has served the minimum limit fixed by the court, good time being allowed as provided by law. It shall be deemed and taken as a part of every such sentence, as fully as though written therein, that the Parole and Pardon Board, by and with the approval of the Governor in the nature of a release or commutation of sentence or commitment, may terminate the term of such imprisonment or commitment earlier than the maximum fixed by the court, as provided in Section 9. The provisions of this paragraph shall not apply to persons committed to the Youth Commission pursuant to clause 1 or clause 2 of Section 3.

Ill. Rev. Stat. 1962, ch. 38, sec. 807 provides that:

> The Parole and Pardon Board shall establish rules and regulations not inconsistent with this act, and shall issue paroles in accordance with the provisions

> of this act and of such rules and regulations adopted hereunder.

State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardons* (October, 1962; effective June 1, 1962) provides, in pertinent part, that:

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.
>
> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) provides, in pertinent part, that:

> Parole shall be denied if the board finds:
> (1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5 provides, in pertinent part, that:

> (f) The Board shall render its decision within a reasonable time after hearing, and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's time for release, or if it denies parole it shall provide for a rehearing not more than twelve months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the effective date of the order granting parole, the matter shall be returned to the Board for review.

Prisoner Review Board Rules Governing Parole 1978, provides, in pertinent part, that:

> V. Basis For Denying Parole
>
> B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:
>
> 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, aggravated arson, treason or calculated criminal drug conspiracy.
>
> 2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

STATEMENT OF THE CASE

On January 28, 1962, the respondent was found unfit to stand trial [illegible] the rape and murder of a three year old girl. On June 21, 19[illegible]3, after spending 10 years in mental institutions, respondent was convicted of the aforementioned murder and sentenced by a state court judge to serve 60 to 100 years in a state penitentiary.

In 1979, the Illinois Prisoner Review Board denied parole for a ninth time.[1] The Board stated:

> Parole is denied based upon the extreme seriousness of the crime of murder. The Board believes your release at this time would deprecate the seriousness of the crime and promote disrespect for the law.

Appendix D at 25a.

The parole statute in effect at the time respondent committed the murder stated, in pertinent part, that:

> The Parole and Pardon Board shall establish rules and regulations not inconsistent with this act, and shall issue parole in accordance with the provisions of this act and of such rules and regulations adopted hereunder.

Ill. Rev. Stat. 1962, ch. 38, §807.

---

[1] The Illinois Prisoner Review Board succeeded the Illinois Parole and Pardon Board (hereafter "Parole Board" or "Board"). The Board denied parole in a regularly scheduled hearing for a tenth time, on March 9, 1982, while a stay of the 7th Circuit opinion was in effect, based again on the seriousness of the offense. Mr. Welsh is eligible for a parole hearing every year pursuant to Ill. Rev. Stat. 1979, ch. 38, § 1003-3-5(f).

Two pertinent parole regulations enacted by the Parole and Pardon Board are as follows:

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.
>
> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardons* (October, 1962; effective June 1, 1962)

In 1973, the Legislature enacted the following parole guidelines:

> Parole shall be denied if the Board finds:
>
> (1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole;
>
> (2) *His release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or*
>
> (3) His release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch.38, §1003-3-5(c). (emphasis added)

Respondent filed a Petition for Writ of Habeas Corpus with the federal district court in the Southern District of Illinois on March 12, 1980. In his petition he claimed that the Illinois Parole Board was violating the ex post facto clauses of the United States and Illinois constitutions by denying him parole solely on the basis of a standard that was not in effect in 1962, the year that he committed the crime for which he is incarcerated.

On April 25, 1980, petitioner responded to the petition by filing a motion to dismiss. The district court dismissed the petition on May 22, 1980.(See Appendix B) The district court held that parole was at the discretion of the Parole and Pardon Board in 1961, and was still at the discretion of the Parole and Pardon Board in 1979. According to the district court, the new statute had not impinged on the Board's discretion. The enactment of Section 1003-3-5(c) only served to clarify the Board's decision making process in issuing parole and did not add or subtract from what the Parole and Pardon Board could consider in making its decision. The court concluded "... due to this great discretion given to the Parole and Pardon Board, this Court cannot find that the petitioner was at a substantial disadvantage due to the change in the statute." See Appendix B at 17a.

On January 12, 1982, the court of appeals reversed the district court and remanded the case to the Illinois Prisoner Review Board. *Welsh v. Mizell*, 668 F.2d 328, 332 (7th Cir. 1982) (See Appendix A). The court of appeals held that:

> "The constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted." *Id.*

On February 10, 1982, the court of appeals denied the petitioner's petition for rehearing and suggestion for rehearing *en banc*. See Appendix C.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE IMPORTANCE OF THIS CASE REQUIRES REVIEW

The consequence of the Seventh Circuit decision in *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982), is to make the parole statutes at the time a prisoner committed his offense fixed. This would preclude a state from creating guidelines to an unguided parole scheme that would merely rationalize parole denials where no reasons were previously given.

The parole law in existence at the time respondent committed his offense permitted the Parole Board to establish rules and regulations. Ill. Rev. Stat. 1962, ch. 38, §807. The Board enacted regulation 12 allowing them to grant parole to a prisoner as they see fit and to deny parole to one whom they determine is not fit. State of Illinois, Dept. of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (October 1962; effective June 1, 1962) (hereinafter cited as *Parole Regulations*). Another regulation the Board enacted was regulation 14 allowing the Board to "consider and evaluate *all factors* in each case, including a prisoner's conduct record." *Id.* (emphasis added). However, there was no provision requiring the Parole Board to state its reasons for denying parole. In fact, prior to 1970, the Board merely stated whether parole had been granted or denied. After 1970 the

Board, on its own, began stating reasons for denial of parole. One such reason was based solely on the seriousness of a prisoner's offense.[2]

In 1973, the Illinois legislature enacted parole guidelines and required for the first time that the Board state its reasons for denial of parole. Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c); Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(f). Parole was to be denied, if the Board did, in their discretion, find one of the following:

> (1) [T]here is a substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c).

In regard to the seriousness of the offense, the Board was required to consider the type of offense as well as aggravating and mitigating circumstances. Prisoner Review Board, *Rules Governing Parole*, 1978 at 6. The new parole guidelines

---

[2] The evidence, contained in Appendix E, was *not* before the district court as petitioner-appellee was successful on a motion to dismiss. The court of appeals at first allowed petitioner to supplement the record with this new evidence, however, after a motion for reconsideration, they later returned the evidence and did not consider it.

But see, Theodore P. Fields, *Illinois Parole and Pardon Board Adult Parole Decision*, 62 Ill. B.J. 20, 21 (1973):

> The Statute [Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)] sets forth the general criteria for denying parole that have been followed by the Board for some time.

therefore did not impinge on the Board's discretion as the Board was merely required to consider the guidelines prior to making their decision whether to grant or deny parole.[3]

The Seventh Circuit ignored the fact that prior to the enactment of the parole guidelines, the Parole Board had unfettered discretion in denying parole. *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1981). In so doing, the court arbitrarily held, rejecting all prior authority, that the second criterion, "that his release at that time would deprecate the seriousness of his offense or promote disrespect for the law" (Ill. Rev. Stat. 1979, ch.38, §1003-3-5(c)), violated the ex post facto clause when applied to the respondent. *Welsh*, 668 F.2d at 332.

The court so held despite the fact that the guidelines merely rationalized the exercise of discretion and excluded from the Board's consideration in denying parole arbitrary, irrelevant factors. Furthermore, there never existed a promise, express or implied, that parole authorities would exercise their discretion in some set fashion. Ill. Rev. Stat. 1961, ch. 38, §801. Under the old unguided parole scheme, respondent could have been denied parole without the Board articulating a reason. Ill. Rev. Stat. 1962, ch. 38, § 807; *See* 62 Ill. B.J. at 20. Also, under the old parole scheme the sentencing judge and the prosecuting attorney were required to furnish the Parole Board with a statement of facts and circumstances surrounding the crime to assist the Board in the exercise of its discretionary authority. Ill. Rev. Stat. 1965, ch. 108, § 203. *Ware v.*

---

[3] *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), affirmed without opinion, 513 F.2d 634 (7th Cir. 1975); (Appendix G); *Ware v. Kaufman*, No. 80 C 3209 (N.D. Ill. October 13, 1981) (Appendix H); *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) (leave to appeal denied January 30, 1981); *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975) See (F).

Kaufmann, No. 80 C 3209 (N.D. Ill., Oct. 13, 1981) (Appendix H). Therefore, the new parole guidelines did not work a detriment to respondent.

The *Welsh* decision has an impact on a number of states which have enacted parole guidelines which utilize the seriousness of the offense criteria in determining parole.[4] Moreover, it also affects every state that had a parole scheme which allowed unfettered discretion in denying parole and which attempted to articulate guidelines in order to rationalize denials of parole. Such states would be precluded, by the Seventh Circuit's decision in *Welsh*, from correcting their arbitrary statutes, thereby working a detriment to many prisoners.

The effect of the *Welsh* decision in Illinois is that between 300 to 400 prisoners will have to receive new parole hearings.[5] Many of these are individuals whose crimes were so serious that they were originally sentenced to death. *See, e.g., People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). Yet the Board will be precluded at these hearings from adhering to its traditional

---

[4] California Administrative Code Title 15 §2281; Col. Rev. Stat. 1979 §16-11-203(1)(c); General Statutes of North Carolina §15A-1571; New Mexico Ann. ch. 31 §21-19; R.I. Gen. Laws §13-8-14.

[5] Already the following cases are pending in federal district courts in Illinois: *United States ex rel. Mallett v. Warden*, No. 82 C 1295 (N.D. Ill.); *United States ex rel. Butler v. Fairman*, No. 82-2031 (C.D. Ill.); *Graham v. McCombs*, No. 82 C 3100 (N.D. Ill.); *Rodney v. Fairman*, No. 82-2085 (C.D. Ill.); *Heriens v. Mizell*, No. 81-3335 (S.D. Ill.); *Burbank v. Franzen*, 80 C 3325 (N.D. Ill.)

There are also a number of cases being appealed to the Seventh Circuit: *Ware v. Kaufman*, 80 C 3209 (N.D. Ill.); *United States ex rel. Heriens v. Irving*, No. 81-1014 (S.D. Ill.); *Sanders v. Illinois Prisoner Review Board*, No. 81-1235 (S.D. Ill.)

mandate in screening long-term prisoners sentenced for heinous crimes prior to 1973, in that a relevant criterion, the seriousness of the offense, will be excluded from consideration.[6]

The State of Illinois submits that it is absolutely preposterous that a federal court should tell this state that it must grant a parole hearing to a murderer such as Richard Speck without considering the seriousness of his eight murders or to the respondent regardless of his rape and murder of a three-year-old girl. Such an order is beyond the constitutional jurisdiction of a federal court on habeas corpus review, is not dictated by any valid consideration of law, and is offensive to common sense notions of morality.

II.

THE COURT OF APPEALS CONCLUSION THAT THE RESPONDENT COULD NOT HAVE BEEN DENIED PAROLE IN 1962 SOLELY BECAUSE OF THE SERIOUSNESS OF HIS OFFENSE IS INCORRECT, UNFOUNDED, AND CONTRARY TO ALL STATE AND FEDERAL AUTHORITIES WHICH HAVE CONSIDERED THIS ISSUE; IT THEREFORE CONSTITUTES AN UNWARRANTED INTRUSION INTO A STATE'S POWER TO DETERMINE ITS OWN PAROLE STANDARDS.

The present dispute between the State of Illinois and the Seventh Circuit Court of Appeals involves the question of

---

[6] *See People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 718, 719 (5th Dist. 1967) (the nature of the offense is relevant to rehabilitation).

whether the Parole Board denied respondent's parole on the basis of regulations not contained in the parole statute at the time of his crime. Despite the court's contention that, "We hold only that the constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted," 668 F.2d at 332, this point has never been disputed by the parties. Illinois denies, however, that respondent's parole was refused on a ground beyond the 1962 parole statute. Thus, the ultimate question involved in this case is: was the respondent's parole denied on the basis of a criterion which could not have supported a parole denial in 1962? Only if this question is answered in the affirmative can the court of appeals' decision be affirmed. If it is answered in the negative, as the Illinois courts have held (see 668 F.2d at 329, citing *Harris v. Irving*, 412 N.E.2d 976), then there can be no prejudice suffered and no question of constitutional violation.

The court of appeals' proof that respondent's parole was unconstitutionally denied may be rendered syllogistically as follows:

> 1. Parole was denied respondent because of "the seriousness of his offense."
>
> 2. The 'seriousness of the offense' criterion could not have resulted in a parole denial under the pre-1973 law.
>
> 3. Therefore, the prisoner was denied parole on the basis of an *ex post facto* law.

Only if each of the first two terms of this syllogism are correct can the Seventh Circuit's decision be affirmed.

The petitioner has no dispute with the first term but contends that the proposition embodied in the second term cannot be accepted. Every Illinois court which has decided this issue

has denied the proposition, and the federal courts have denied this proposition with regard to the analogous federal parole law. *Harris v. Irving, supra*; *Warren v. U.S. Parole Com.*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 50 L.W. 3669 (February 12, 1982). Indeed, the Seventh Circuit has denied the proposition with respect to both Illinois and federal statutes. *See Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without op.*, 513 F.2d 634 (7th Cir. 1975) (See Appendix G); *Garcia v. Parole Board*, 557 F.2d 100 (7th Cir. 1977).

The State of Illinois urges this Court to read the 1962 parole guidelines, quoted *supra*, with this central question in mind: could the Parole Board have denied parole because of the seriousness of the offense? Unless this Court concludes that, as a matter of law, the earlier guidelines did not, under any circumstances, allow the denial of parole for this reason, then the Seventh Circuit has erred and its decision should be reviewed and reversed.

It must first be noted that both the Illinois Constitution of 1870 (in effect from 1962-1970) and the Illinois Constitution of 1970 (in effect at the time respondent's parole was denied) limited the Parole Board. Under the Constitution of 1870, it was required that all penalties be proportioned to the nature of the offense (Art. II, § 11). Similarly, the current Constitution specifically requires that sentences served reflect "the seriousness of the offense." (Art. I, § 11) In light of these constitutional commands, it is incredible that the Seventh Circuit has concluded that the parole guidelines required the Parole Board members to ignore their constitutional duty, by preventing them from ever, under any circumstances, considering the seriousness of the offense.

In support of its rejection of prior case law on point, the court of appeals misstated the holdings of *People v. Moore*, 133 Ill. App.2d 827, 272 N.E.2d 270 (5th Dist. 1971); and *People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 716 (5th Dist. 1967).

Both of these cases were cited to illustrate the function of parole. However, neither case involved parole. *People v. Moore* involved probation eligibility. 272 N.E.2d at 270. *People v. Lillie* involved probation violations. 223 N.E.2d at 716. Parole and probation are distinct from one another. *Greenholtz v. Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979). Their functions are different. *Id.* Indeed, in *People v. Lillie*, the court held *"that past offenses were relevant to the matter of rehabilitation,"* 223 N.E.2d at 719 (emphasis added), which is contrary to the court of appeals decision in *Welsh*. The court of appeals also attempts to prove its argument by means of example. It states that, "at the time of [Welsh's] offense, exemplary conduct during his imprisonment might well have resulted in parole." 668 F.2d at 331. However, the same may certainly be said of the present parole scheme. The Board is not required to give conclusive effect to any one criterion. Also, it is claimed, "Under the later enactment, no evidence of satisfactory rehabilitation can overcome a finding that the nature of his crime makes him a socially undesirable candidate for parole." 668 F.2d at 331. This statement is incorrect and, even if correct, would not advance the argument. The present Board's decision involves a balancing process and "evidence of satisfactory rehabilitation" can "overcome" any other consideration if the Board so decides. Prisoner Review Board, *Rules Governing Prisoners*, 1978 at 6. But, even if correct, it must be noted that the earlier Parole Board was accorded exactly the same discretion to weigh the relevant criteria as it saw fit, and the earlier Board was not required to give any reasons for its action.

The court of appeals states that the purposes of incarceration were served in Illinois in 1962 "when the individual prisoner was deterred from engaging in further criminal activity and his conduct demonstrated his rehabilitation." 668 F.2d at 330. No support is offered for this incredible statement.

One who inquires as to the more fundamental traditional bases of punishment (i.e., retribution and general deterrence), which were constitutionally mandated (Ill. Const. of 1870, Art. II, §11), is met with the court's opinion that "[t]hose factors had already determined the minimum and maximum prison terms imposed by the sentencing judge," and thus "did not enter directly into the Parole Board's decision." 668 F.2d at 330. The court's theory, however, is not and has never been the law in Illinois.

This position cannot be maintained. Application of the court's theory would create clearly undesirable results: for example, by analogy trial courts would be precluded from considering the third factor, potential for rehabilitation, in setting minimum and maximum sentences, though such consideration is clearly mandated by the legislature. Ill. Rev. Stat. 1979, ch. 38, §1005-5-3.1(8)-(10). Also, the legislature has specifically instructed the trial court to consider general deterrence (i.e., "the sentence is necessary to deter others from committing the same crime") in setting minimum and maximum sentences, but the Seventh Circuit decision would not allow this. *See* Ill. Rev. Stat. 1979, ch. 38, § 1005-5-3.2(7).

So it must be seen that the neat compartmentalization of the traditional bases of punishment to different stages of incarceration which the Seventh Circuit finds in the 1962 law is preposterous. Does the Seventh Circuit truly believe that all those who served on the Parole Board before 1973 interpreted the statute's grant of a complete and unfettered discretion as in fact a prohibition on the consideration of retribution and general deterrence? It is very hard to believe that the exercise of such a carefully delimited power was embodied in their two-word decisions: "parole granted" or "parole denied." It is simply absurd that the court of appeals has ordered the Parole Board to return to the loose structure of its former system. This would inflict a detriment on all prisoners.

The theory that retribution and general deterrence should be used by states only to set the upper and lower limits of sentence with specific deterrence and rehabilitation mediating between the two extremes has been advanced by Dean Morris. *See, The Future of Imprisonment* (1974) at ch. 1, 3. But the theory has been rejected by most critics and cannot be said to embody the state of the law in Illinois. In particular, the 1976 Report of the Committee for the Study of Incarceration completely rejected this view. Von Hirsh, *Doing Justice* (1976) at 73-74, 164, n. 18. The Committee specifically noted that, "understating the blame depreciates the values that are involved: disproportionately lenient punishment for murder implies that human life — the victim's life — is not worthy of much concern." *Doing Justice* at 73. Expressions of the traditional, majority views of the purpose of punishment may also be found in H.M. Hart, Jr., "The Aims of the Criminal Law," 23 Law and Contemporary Problems 401 (1958) and H.L.A. Hart, *Punishment and Responsibility* (1968) at ch. 9.

The Seventh Circuit's assumption that the above-outlined theory of punishment expressed the purposes of incarceration in Illinois in 1962 is nothing more than an election between conflicting penalogical theories. While there might be some justification for such an opinion were the Seventh Circuit called on to interpret the federal parole statutes,[7] there is no similar justification for the imposition of such a theory upon the Illinois state penal system. When this federal rewriting of

---

[7] But it should be noted that both the Seventh Circuit and the District of Columbia Circuit have concluded otherwise in the federal sphere. See Arguments III and IV, *infra*.

state statutes is accomplished in the face of contrary state court interpretations[9], the result is a complete abrogation of principles of federal-state comity in the guise of constitutional interpretation.

The function of parole in Illinois in 1962 was not simply, as the Seventh Circuit claims, to apply utilitarian notions of deterrence and rehabilitation; it was to see that *all* of the purposes of incarceration were fulfilled. The court of appeals is not a super-legislature which can dictate to Illinois what those purposes were. Where the Illinois courts have stated what the purposes of punishment are, and those purposes and goals are constitutionally permissible, the court of appeals should not be allowed to follow its own theory of the purpose of punishment in Illinois.

The court of appeals view that the seriousness of the offense criterion operates solely for purposes of retribution and general deterence is a gross oversimplification. 668 F.2d at 331. It has long been recognized that the reintegration and rehabilitation of a prisoner into society are goals which are pursued "within general constraints imposed by a duty to protect the public from any potential criminal behavior by the parolee." Comment, "The Parole System," 120 U.Pa. L. Rev. 282, 284 (1971) (hereinafter cited as *Parole*.) At the stage of the parole process at which the Board makes the initial decision of whether or not to grant parole, "the system attempts to identify those prisoners who have the best chance for rehabilitation *and, at the same time, pose the least threat to public safety*". *Parole* at 285 (emphasis added)

---

[9] It must be remembered that the Seventh Circuit found jurisdiction to proceed in this case not because the respondent had in fact exhausted his claim in state court, but because the court concluded that "[a]n Illinois appellate court has recently rejected a challenge identical to Welsh's." 668 F.2d at 329.

The seriousness of the offense is relevant to the matter of rehabilitation. *People v. Lillie*, 223 N.E.2d at 719. The court of appeals, in holding that the seriousness of the offense criterion only had the purpose of retribution and general deterrence, neglected to recognize that a major criterion of all parole boards is "the probability of recidivism." *Parole* at 285. Studies have shown that different crimes have varying rates of recidivism. *Id.* Moreover, the Board must also consider the type of crime to gauge the probable impact of repeated criminal behavior on society as a whole. "The danger of a forger returning to his former ways, though more probable than the rapist repeating his crime, is certainly less serious." *Id; See also* Ill. Rev. Stat. 1967, ch. 108, §203 (providing for the circumstances of a crime to be furnished to the Board).

In addition, there is a special deterrence effect. If the Board were required to disregard the severity of the crime as well as the suggested sentence, this would inevitably deprecate the seriousness of the crime in petitioner's eyes and promote disrespect for the law on his part. *See generally* Gibbs, *Crime, Punishment, Deterrence* (1976) at 67.

Because it has been recognized that reintegration and rehabilitation of prisoners into society are goals which are pursued within general constraints imposed by a duty to protect the public from any potential criminal behavior by a parolee, a very relevant criterion in the Board's consideration has always been the seriousness of the offense. *Parole* at 305. *See People v. Lillie*, 223 N.E.2d at 719 (nature of the offense is relevant to rehabilitation.); *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975); *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980); *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975); Ill. Rev. Stat. 1967, ch. 108, §203. (See Appendices F, G).

The court of appeals cited a prior chairman of the Board for the proposition that the 'seriousness of the offense' criterion constitutes a marked departure from the prior law. 668 F.2d at 331. The passage which the court excerpts does not prove its point. Indeed, the court ignored the fact that the chairman also stated in regards to the statute involved in the instant case:

> *This statute sets forth the general criteria for denying parole that have been followed by the Board for some time.* 62 Ill. B.J. at 21. (emphasis added)

The court of appeals in rejecting all the cases on point cited *Weaver v. Graham*, 450 U.S. 24 (1981). *Weaver* is clearly distinguishable from the instant case. *Weaver* concerns the expiration date of sentence. In *Weaver* what was in issue was a statute reducing the amount of "gain time" for good conduct. *Id.*

In the instant case what is in issue is the Board's exercise of discretion in the denial of parole. Respondent's eligibility for parole is not in issue. As was stated by the former chairman of the Parole Board:

> Parole eligibility [in Illinois] is not a matter of application but is determined automatically. An offender will be eligible for parole consideration after serving his minimum sentence less credit received for good time.

62 Ill. B.J. at 21.

The issues presented in *Weaver* and in the instant case are distinct from one another. In *Weaver,* the statute in question reduced the number of good time credits that Weaver was automatically entitled to. In the instant case, parole was not automatic. *People v. Kinney*, 30 Ill. 2d 201, 195 N.E.2d 651 (1964); *See* 62 Ill. B.J. at 21. Once respondent became eligible for parole, his parole was subject to the discretion of the Board. *Id.* There has never been anything automatic about

granting parole in Illinois. *Compare* Ill. Rev. Stat. 1962, ch. 38, § 807, *with* Ill. Rev. Stat. 1977, ch. 38, § 1003-3-5(c)(2). Therefore, since all that is in issue in the instant case, is the Parole Board's discretionary denial of respondent's parole, once he was eligible, the court of appeals erred in subjecting the Board's decision to judicial review. *United States ex rel. Cambell v. Pate*, 401 F.2d. 55 (7th Cir. 1968).

In support of its position, the court of appeals cited a number of federal cases arising under the Youth Corrections Act. 668 F.2d at 332. *See Shepard v. Tayler*, 556 F.2d 648 (2d Cir. 1977); *Marshall v. Garrison*, 654 F.2d 440 (4th Cir. 1981); *De Parolta v. Garrison*, 575 F.2d 749 (9th Cir. 1975). However, the court, without citing any authority for its proposition, held that those cases are apposite to the situation presented in the instant case. *Id.* This is simply incorrect. The prior Youth Offenders Act required:

> [A] mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life and previous delinquency or criminal experience, and any mental or physical defects or other factor contributing to his delinquency.

18 U.S.C. § 501.4.

In the long list of criteria provided by the prior statute the severity of the youthful offender's crime was "*conspicuously absent* from the factors that could be observed in determining whether to treat or release him." (emphasis added) *Shepard*, 550 F.2d at 653; *Marshall*, 659 F.2d at 442.

Unlike the Youth Offender Act, the statute involved in the instant case, at the time the respondent committed his offense, did not provide any guidelines. Ill. Rev. Stat. ch. 38, §801 (effective January 1, 1962). The regulations cited by the court of appeals were very general. "The Board shall evaluate all the

factors in each case, including the petitioner's conduct record." *Parole Bd. Rules*, Rule 14. Therefore, it is a misnomer to say, as the Seventh Circuit has, that the severity of the offense was "conspicuously absent" from consideration in the instant case.

The legislative goal in enacting §1003-3-5(c)(2) was not punishment of offenders for its own sake. The Parole Board is not required under the new statute to deny parole to every murderer. Prisoner Review Board, *Rules Governing Parole* (1978) at 6. Rather it was a commendable attempt, similar to the federal parole changes of 1976, to add specific guidelines to the vague charge contained in the prior statute and regulations.[9] It requires the Parole Board to consider all factors in the case in determining a parole applicant's fitness for parole. Ill. Rev. Stat., 1961, ch. 38, §807. The Board, under the new statute, is merely required to consider the seriousness of the offense. Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)[10] Furthermore, it was considered by the Board prior to the enactment of the Statute. 62 Ill. B.J. at 21.

In enacting the amended parole provision at issue here, the legislature simply articulated the circumstances under which the Board should deny parole in order to ensure uniformity in the decision-making process. The amended standard is not harsher than the earlier law, but rather, more specific. It announced no criterion which could not have been applied, or

---

[9] *See Warren v. United States Parole Commission*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied* 50 L.W. 3669 (February 22, 1982); *See also Garcia v. U.S. Parole Bd.*, 557 F.2d 100 (7th Cir. 1977) (holding that the United States parole board was entitled to consider offense severity in making parole determinations)

[10] The Board is required to consider the type of crime as well as the aggravating and mitigating circumstances of the crime. Prisoner Review Board, *Rules Governing Parole*, (1978) at 6.

was not in fact applied, under the earlier law. Therefore, application of this standard to respondent did not cause him to suffer *ex post facto* punishment.

Despite the broad scope of the prior law enunciated in the statute itself and in the regulations, the court of appeals, rejecting all prior case law, gave a narrow construction to the focus of the prior parole law. In failing to recognize that recidivism and special deterrence had always been a part of the focus of the Parole Board, the court came to the wrong conclusion. Certiorari is therefore warranted in the instant case where the court of appeals, in an unjustified intrusion into the State's power to determine and interpret its own sentencing and parole standards, disregarded all prior, relevant case law and based its opinion instead upon suspect sociology and its own views of the purposes of punishment in the State of Illinois.

In propounding its own unsupported views as to the nature of parole in Illinois, the court has violated the maxim of statutory interpretation that a "court will interpret statutes whenever possible so as to avoid significant constitutional difficulties." *In re Evans*, 452 F.2d 1239, 1246 (D.C. Cir. 1971); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *See also* C. Sand, *Sutherland on Statutory Construction* § 45.11 (4th ed. 1973). It would have been a simple matter to construe the Illinois provisions, as the Illinois courts have, in a manner consistent with the constitution. In failing to do so, the court of appeals has needlessly intruded into the proper sphere of the state. U.S. Const., Amendment X.

III.

THERE IS A CONFLICT WITH A DECISION OF ANOTHER CIRCUIT

There is a directly analogous *ex post facto* parole guideline case, *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 50 L.W. 3669 (February 22, 1982), which was published after the instant case was decided. Turning back the habeas corpus challenge of a Federal prisoner who alleged that new parole guidelines and use of the "Salient Factor Score" established under the 1976 Parole Commission and Reorganization Act diminished his reparole chances in violation of the *ex post facto* clause, the Circuit Court for the District of Columbia decided that:

> 1) It could not be said that Warren was worse off now than under the old unguided discretion system because *"no one knows what the old Parole Board would have done"* and the present guidelines grew out of traditional board concerns;
>
> 2) Warren's case hardly at all implicates the policies behind the *ex post facto* clause since the guidelines serve the traditional core purposes of the criminal law; and,
>
> 3) Being at the mercy of the Parole Commission was part of the punishment, and the existence of the Commission's discretionary power had not been altered by the new guidelines, even though the manner in which the Commission exercises its discretion has changed.

659 F.2d at 193-196 (emphasis in original).

The Court of Appeals concluded:

> The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion. Such are the wages of crimes.

659 F.2d at 196.

As a matter of policy the court also noted:

> A ruling favorable to the appellant would imply that the guidelines now being used by the Commission are annexed to the sentence of prisoners convicted now and in the future. This would mean that, contrary to the will of Congress, the guidelines could not be altered under a multiplicity of standards applicable to individual convicts depending on the dates of their crimes.
>
> We do not believe the *ex post facto* clause demands such rigid applications.

659 F.2d at 184. In closing its opinion, the *Warren* Court observed that it was joined in its conclusion by all the Circuits, including the Seventh Circuit, that have considered the issue except the Third Circuit. 659 F.2d at 186.[11]

The court of appeals in the present case held that under the old statute seriousness of the offense could not have had decisive weight. 668 F.2d at 331. However, prior to 1973, the Board was not required to state its reasons for denial of parole. Ill. Rev. Stat. 1962, ch. 38, §807. Traditionally, in Illinois, the bases for decision-making have not been revealed by

---

[11] *See Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), *vacated and remanded on other grounds*, 445 U.S. 388 (1980).

parole boards because of the fear that offenders might use such statements as the basis for opposition or litigation questioning the Board decision. 62 Ill. B.J. at 22. Therefore, no one knows what the Board would have done under the old unguided discretionary system. The District of Columbia Court was frank enough to admit this limitation, even with regard to a federal statute which it is charged to enforce and interpret. *Warren*, 659 F.2d at 193. By contrast, the Seventh Circuit has assumed a position of omniscience. It presumes to tell the State of Illinois precisely what would have occurred under the Illinois law, and it predicates its finding of constitutional violation solely upon such conjecture. Simply put, it is astonishing that the Seventh Circuit is telling a state court what would have necessarily happened under the state statute, while the District of Columbia Circuit frankly admits that, under the fundamentally identical *federal* statute, *"no one knows"* what would have happened. *Warren*, 659 F.2d at 193 (emphasis in original). Such misplaced judicial arrogance is wholly inconsistent with notions of federal-state comity.

Furthermore, there exists no statutory or case authority for the Seventh Circuit's interpretation of Illinois parole law prior to 1973. On the contrary, the authority goes against that court's interpretation. Illinois has always viewed seriousness of the offense to be relevant to rehabilitation. *People v. Lillie*, 79 Ill. App. 2d 174, 223 N.E.2d 716 (5th Dist. 1967). Parole denials based upon the criteria that "release ... would deprecate the seriousness of his offense or promote disrespect for the law" had been utilized by the Board for some time prior to 1973. 62 Ill. B.J. at 21. This criteria is based upon principles that have long existed in the Illinois system of criminal justice. *Id* at 22.

As in *Warren*, the respondent herein was sentenced to the mercy of the Parole Board as part of his punishment. Ill. Rev. Stat. 1962, ch. 38, § 801. The Board's discretionary power has

not been altered by the new guidelines (i.e. the board is not required to automatically deny parole because the respondent committed a murder). Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c)(2). Rather the Board was required to consider the aggravating as well as mitigating circumstances of the crime. Prisoner Review Board, *Rules Governing Parole*, 1978 at 6.

No promise express or implied was ever held out that the Board would exercise its discretion in some set fashion. Ill. Rev. Stat. 1962, ch. 38, §807. Certiorari is therefore warranted in the instant case because the mere fact that the Parole Board's mercy is now channeled, structured and rationalized by a formal system of guidelines does not constitute an *ex post facto* violation. Respondent was sentenced to the Board's discretion. He is being held at their discretion. "Such are the wages of crime." *Warren*, 659 F.2d at 196.

IV.

THE SEVENTH CIRCUIT, IN VIOLATION OF THE TENTH AMENDMENT, CONDEMNED IN THE STATE SYSTEM OF PAROLE, WHAT IT HAS APPROVED IN THE FEDERAL SYSTEM.

In *Garcia v. United States Board of Parole*, 557 F.2d 100 (7th Cir. 1977), the Seventh Circuit held that the following federal parole guideline "implicitly authorized the Board to consider offense severity in making its parole determinations." The guideline stated:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner

> will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

18 U.S.C. § 4203(a), quoted in *Garcia*, at 105, n. 5; *cf. Zeidman v. United States Parole Commission*, 593 F.2d 806 (7th Cir. 1979) (noting that "offense severity" may be considered in federal parole hearings).

In the present case, the Seventh Circuit held that the following state parole guideline focused the Illinois Parole Board's inquiry "on the prisoner himself". The severity of the offense committed and society's concern with sufficient punishment "did not enter directly into the Parole Board's decision." 668 F.2d at 330.

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate sentence is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied. . . .
>
> • • •
>
> 14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Welsh, 668 F.2d at 330. Moreover, the Seventh Circuit in *Welsh* held that the later state guideline specifically recognizing the seriousness of the offense represented a "marked departure" from the guidelines quoted above and imposed

"for the first time into the parole decision considerations of retributive justice (the relationship between time served and the nature of the offense)." *Welsh*, 668 F.2d at 331.

The two decisions of the Seventh Circuit cannot be reconciled. The Court has condemned in the state system what it had earlier approved in the federal system. The Constitution does not allow for such a two-tiered scheme of justice. Simply stated, the State of Illinois submits that a federal court is without constitutional jurisdiction to condemn in the state sphere what it has approved in the federal system. The Seventh Circuit has already held in *Garcia* that a general parole guideline, even though it may focus on the characteristics of the individual prisoner, nevertheless implicitly authorizes the federal parole board to consider "offense severity". It may not, therefore, construe Illinois' similar general parole guideline to be completely free of any such consideration, particularly where the Illinois courts have repeatedly refused to so construe the provision. *Harris v. Irving*, 90 Ill. App. 3d 56, 412. N.E.2d 976 (5th Dist. 1980).

Moreover, the most recent federal court to specifically address this alleged claim of constitutional violation has similarly found no error. *Warren v. United States Parole Commission*, 659 F.2d 183 (D.C.Cir. 1981). It is a reserved right of the State of Illinois to be free from specially applied constitutional interpretations not generally applicable to the federal government. U.S. Constitution, Amendment X.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE

Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Petitioner.

RONALD LEE BELL
Assistant Attorney General

Of Counsel.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY WELSH,

Petitioner-Appellant,

v. No. 80-1362

LARRY MIZELL, Warden Vienna Correctional Center, Vienna, Illinois, and TYRONE C. FAHNER, Attorney General of the State of Illinois,*

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. CV 80-4104 — William L. Beatty, Judge.

ARGUED SEPTEMBER 18, 1981 — DECIDED JANUARY 12, 1982

Before CUMMINGS, *Chief Judge,* SWYGERT, *Senior Circuit Judge,* and BAUER, *Circuit Judge.*

---

* William J. Scott, one of the original defendants, was succeeded by Tyrone C. Fahner. See Rule 25(d) of the Federal Rules of Civil Procedure.

CUMMINGS, *Chief Judge.* Gary Welsh is a prisoner at the Illinois Correctional Center in Vienna, Illinois. The murder of which he was convicted was committed in 1962, but Welsh was not competent to stand trial until 1973. At that time he was sentenced in the Circuit Court of McHenry County to a prison term of sixty to one hundred years. His direct appeal was denied, *People v. Welsh,* 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975). He has served his minimum sentence, with allowance for statutory good time, in several state mental hospitals and in prison. He has been denied parole nine times.

In March 1980 Welsh filed a *pro se* petition for a writ of habeas corpus. He contended that Illinois' statutory and regulatory parole criteria had changed significantly between 1962, when he committed his crime, and 1973, when new legislation took effect. In 1962 the emphasis had been on preventing further crimes by the particular candidate for parole (special deterrence). The 1973 criteria reflected instead a philosophy of general deterrence — that a prisoner should not be paroled so long as his incarceration might deter other potential offenders. The application of the new parole criteria to him, Welsh argued, contravened the *ex post facto* clause of the United States Constitution.[1]

The district court dismissed Welsh's petition on the motion of the Attorney General of Illinois. Judge Beatty reasoned that the changes in parole criteria were procedural and that procedural changes do not violate the *ex post facto* clause when they "operate only in a limited and unsubstantial manner to [the petitioner's] disadvantage." May 22, 1980 order,

---

[1] "No State shall * * * pass any * * * ex post facto Law." U.S. Const., Art. 1 § 10, cl. 1. A similar clause applies to the federal government. Art. I, § 9, cl. 3. The Illinois Constitution contains a like provision in Art. 1 § 16.

p. 2 (quoting *Beazell v. Ohio*, 269 U.S. 167,170). He assumed that the Parole and Pardon Board (now the Illinois Prisoner Review Board) had always had broad discretion to grant or deny parole and that Welsh therefore could not show how the changed provisions caused him cognizable harm. *Id.* at 3. This appeal followed. For the reasons set out below, we reverse and remand to the Illinois Prisoner Review Board with instructions to give prompt consideration to Welsh's parole application under the statute and regulations applicable in 1962.

The Doctrine of Exhaustion of Remedies Is Inapplicable.

We are met at the threshold by a jurisdictional question. The state has argued, although the point was not pressed on appeal, that Welsh's petition should be dismissed for failure to exhaust state remedies. There are two reasons for not requiring exhaustion. First, the state has expressly waived it. In urging this Court to deny Welsh's motion for a stay, the state claimed to have shown by its original motion to dismiss that "although petitioner had not gone to the state courts for relief * * * *it would have been futile for him to do so,*" (emphasis added).[2] Second, even without the state's waiver, sending Welsh back to the state courts would be an exercise in futility, which federal habeas procedure allows us to pretermit. An Illinois appellate court has recently rejected a challenge identical to Welsh's, *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980), and the Illinois Supreme Court denied leave to appeal that decision on January 30, 1981. Thus "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner," 18 U.S.C. § 2254(b).

[2] January 30, 1981, response to Petitioner-Appellant's Motion for Stay.

The Ex Post Facto Clause Was Violated.

In its most recent explication of the *ex post facto* clause, the Supreme Court has said:

> The *ex post facto* prohibition forbids * * * the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed." * * * [T]wo critical elements must be present for a criminal or penal law to be *ex post facto;* it must be retrospective, that is, it must apply to events occuring before its enactment, and it must disadvantage the offender affected by it.
>
> *Weaver v. Graham,* 450 U.S. 24, 28, 29 (citations and footnotes omitted)

We begin our inquiry therefore by looking at the criteria for parole in effect in September 1962, when Welsh committed the crime for which he was sentenced. They were contained in Sections 6 and 7b of the Parole Law. Ill. Rev. Stat. 1961, ch. 38 §§ 806,808a. Cf. Ill. Rev. Stat. 1961, ch. 127 § 55b. Section 6 required the sentencing judge and the State's Attorney to transmit to the Parole Board an official statement of all "facts or circumstances which may tend to throw light on the question as to whether such prisoner * * * is capable again of becoming a law-abiding citizen." Section 7b required the Parole Board to give "due consideration and weight * * * to the record of the prisoner's conduct kept by the superintendent or warden."

The regulations issued by the Parole Board sounded similar themes. For example,

> 12. If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate sentance is entitled to parole, they shall

enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, parole shall be denied, and such further order entered as in the judgment of the members is warranted.

• • •

14. In its consideration of the question of whether a prisoner should be paroled, the Parole and Pardon Board shall evaluate all the factors in each case, including the prisoner's conduct record, and grant or deny release on parole in accordance with its judgment.

Thus the focus of the Parole Board's inquiry was on the prisoner himself, as observed by the prosecuting and sentencing authorities and by prison officials. The purpose of incarceration had been served — and parole was appropriate — when the individual prisoner was deterred from engaging in further criminal activity and his conduct demonstrated his rehabilitation. The severity of the offense committed and society's concern with sufficient punishment did not enter directly into the Parole Board's decision. Those factors had already determined the minimum and maximum prison terms imposed by the sentencing judge. The minimum sentence was intended to satisfy society's desire for adequate punishment; the maximum sentence was a rough indicator of when rehabilitation could be presumed. The function of parole was to mediate between the two extremes. *People v. Moore*, 133 Ill. App. 2d 827, 829, 272 N.E.2d 270, 271 (5th Dist. 1971); *People v. Lillie*, 79 Ill. App.2d 174, 178, 223 N.E.2d 716, 718-719 (5th Dist. 1967).

In 1972 the Illinois legislature enacted new parole criteria based on the Model Penal Code. These criteria, which took effect on January 1, 1973, provide for the denial of parole if:

> (1) there is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline. Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) (Ill. Rev. Stat. 1979, *id.*)

Criteria (1) and (3) invite the Parole Board to look at many of the same factors as under previous law. Criterion (2), however, is a marked departure, importing for the first time into the parole decision considerations of retributive justice (the relationship between time served and the nature of the offense) and general deterrence (incarceration as a means of promoting general respect for law). [3] Furthermore, the

---

[3] This shift is illustrated by the comments of Theodore P. Fields, chairman of the Parole and Pardon Board from January 1971 to August 1972, in 62 Ill. B.J. 22 (1973):

> The second statutory ground for denial breaks down into two categories of principles that exist in our system of criminal justice: "His release at that time would deprecate the seriousness of his offense" means simply, under our present standards, has the man who committed a certain crime served a reasonable enough time considering the nature of the crime * * * The second category is that "his release at that time would . . . promote disrespect for the law." This relates to the principle of deterrence. If an offender is released at too early a date as compared with the nature of the crime committed, others would feel there is no reason they should worry about committing such crimes because there wouldn't be much of a penalty to be suffered * * * Also, for a viable system of criminal justice, it is necessary for the public to have confidence in and respect for the law * * * The length of time served for particular offenses is currently one of the elements that does have an overall effect on the public in its respect for the law.

statute allows any one of the criteria to serve as a basis for parole denial. Not only is criterion (2) new, therefore, but it can also be determinative. The district court failed to recognize that Welsh's petition presented exactly that case: the Parole Board gave only the second of the three factors as its reason for denying parole,[4] and that factor could not have had decisive weight under the Board's 1962 procedures.

It thus appears that the change in law has worked a substantial harm to Welsh. At the time of his offense, exemplary conduct during his imprisonment might well have resulted in parole. Under the later enactment, no evidence of satisfactory rehabilitation can overcome a finding that the nature of his crime makes him a socially undesirable candidate for parole. This change satisfies both prongs of the *Weaver* test: it is retrospective and it disadvantages Welsh. It would also satisfy older, more restrictive formulations of the test for an *ex post facto* violation, which require a direct, after-the-fact enhancement of punishment. Section 1 of the Parole Law in effect at the time Welsh committed his crime stated:

> It shall be deemed and taken *as part of every sentence*, as fully as though written therein, that the Parole and Pardon Board, by and with the approval of the Governor in the nature of a release or commutation of sentence * * * may terminate the term of such imprisonment * * * earlier than the maximum fixed by the court * * *
>
> Ill. Rev. Stat. 1961 ch. 38 § 801 (as amended by H.B. No. 343, 1961, Ill. Laws) (emphasis added)

The Supreme Court has also warned that a "repealer of parole eligibility" may amount to a "greater or more severe *punishment* than was prescribed by the law at the time of the * * * offense." Sounding in a pragmatic note, Justice Brennan wrote,

---

[4] Exhibit 1 to petition for writ of habeas corpus.

"[O]nly an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole." *Warden v. Marrero*, 417 U.S. 653, 662-663 (emphasis in original; citations omitted). *Accord, Rodriguez v. United States Parole Commission*, 594 F.2d 170, 176 (7th Cir. 1979).

We find considerable support for our holding that the change from special deterrence criteria to general deterrence criteria is substantial and that the retrospective application of the general deterrence criteria violates the *ex post facto* clause. In *Weaver v. Graham, supra*, 450 U.S. 24, a Mississippi statute that changed the computation of "gain time credits" violated the *ex post facto* clause. In *Lindsey v. Washington*, 301 U.S. 397, legislation that amended a discretionary fifteen-year sentence to a mandatory fifteen-year term could not be given retrospective effect. In *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967) (3-judge court), affirmed, 390 U.S. 713, legislation that made "good conduct deductions" forfeit if parole conditions were violated could only be constitutionally applied to prisoners whose crimes were committed after the statute was enacted.

In addition, several courts of appeals have held that federal parole criteria, amended in 1976 to include depreciation of the seriousness of the offense, tendency to promote disrespect for the law, and jeopardy to the public welfare, could not be applied to youthful offenders whose crimes were committed before that date. The Youth Corrections Act had, until the 1976 amendments, focused on "a mental and physical examination to ascertain [the youthful offender's] personal traits, his capabilities, pertinent circumstances of his family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency." *Shepard v. Taylor*, 556 F.2d 648, 653 (2d Cir. 1977) (summarizing 18 U.S.C. § 5014). *Accord, Marshall v.*

Garrison, 659 F.2d 440, 444-446 (4th Cir. 1981); *DePeralta v. Garrison*, 575 F.2d 749 (9th Cir. 1978). While Youth Corrections Act precedents are not automatically transferrable to parole challenges by adult offenders, the changes wrought by the Illinois legislature are of a sufficient magnitude to render these cases apposite. The shift in criteria is, for example, more marked than was true in *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977), were no *ex post facto* violation was found.[5]

There are decisions in which *ex post facto* challenges virtually identical to Welsh's have been made but without success. See, *e.g.*, *United States* ex rel. *McCalvin v. Irving*, No. 80 C 1522 (N.D. Ill. 1981); *United States* ex rel. *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), affirmed without opinion, 513 F.2d 634 (7th Cir. 1975); and *People v. Harper*, 27 Ill. App. 3d 406, 327 N.E.2d 91 (5th Dist. 1975) (abstract).

We think the reasoning in these cases is flawed, as Judge Beatty's was here, by two misconceptions. First, the prisoner does not have to show that he had a vested right to be paroled. That showing would be necessary for a contract clause or due process challenge, but it is not relevant to an *ex post facto* claim. *Weaver v. Graham*, *supra*, 450 U.S. at 29-30, is now dispositive on that point. Second, it is not an answer to an *ex post facto* challenge to say that parole is a matter of "legislative grace." As Judge Aldrich noted in *Greenfield v. Scafati*, *supra*, 277 F. Supp. 644, 646:

> It is true that parole is commonly spoken of as a matter of grace, and not of right. * * * It would be more accurate, however, to say that a prisoner's en-

---

[5] In *Ruip*, the prisoner was challenging the 1973 federal parole guidelines. Under those guidelines the United States Parole Commission identified nine personal characteristics and six categories of offense severity. It assigned the prisoner scores for each characteristic and a rating for offense severity, and granted or denied parole based on both factors.

> titlement to parole lies in the discretion of the parole board. It would not follow because a prisoner might not receive parole that it would not be an unlawful ex post facto burden to deprive him altogether of the right to be found qualified.

Even discretionary decisions are made under some constraints. We hold only that the constraints on the Parole Board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted.

Remand to the Illinois Prisoner Review Board is the Appropriate Remedy

Welsh has argued that we should either order his immediate release, since the only ground for the most recent denial of his parole was constitutionally inapplicable, or remand his case to the Prisoner Review Board for reconsideration under the relevant guidelines. A remand is clearly the appropriate relief. *See Weaver v. Graham, supra*, 450 U.S. at 36-37, and *People* ex rel. *Jones v. Brantley*, 45 Ill. 2d 335, 337 259 N.E.2d 33, 34 (1970). If the Board denies parole yet again, it must — as the state acknowledges (Br. 6) — give its reasons in order to satisfy the due process requirements of *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1,15,16.

Reversed and remanded for further proceedings consistent herewith.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 5730 — Midwest Law Printing Co., Inc., Chicago — 1-12-82 — 400

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY WELSH,

Petitioner,

vs.

LARRY MIZELL, Warden Vienna Correctional Center, Vienna, Illinois, and
WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

Respondents.

No. CV 80-4104

ORDER

Petitioner, Gary Welsh, was found guilty of murder by a jury in McHenry County and was sentenced to a term of 60 to 100 years in the penitentiary. On September 25, 1979, petitioner was denied parole on the basis that his release "would deprecate the seriousness of the crime and promote disrespect for the law" as was proper under Illinois Revised Statutes, 1977, Chapter 38 Section 1003-3-5(c). Since the crime was committed long before this statute was passed, petitioner contends the parole statute was an impermissible *ex post facto* law and so the use of it violated his constitutional rights. On March 12, 1980, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254. The Attorney General of Illinois has filed a motion to dismiss claiming the absence of any violation of the *ex post facto clause*. We agree.

The enactment of Illinois Revised Statutes, 1977, Chapter 38 Section 1003-3-5(c) amounted to a change in the Illinois Parole Board's procedure as to granting parole and normally the prohibition against *ex post facto* laws "applies only to

changes in substantive law, and not to changes in procedure." *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). Some changes in procedure, though, can operate in such a way as to fall within the *ex post facto* law prohibition:

> "And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506; *Thompson v. Utah*, 170 U.S. 343, 15 S.Ct. 620, 42 L.Ed. 1061. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and *which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.*" (Emphasis Added.) *Beazell v. State of Ohio*, 269 U.S. 167, 170, 46 S.Ct. 68, 69 (1925).

Courts have held changes in procedure to be a violation of the prohibition against *ex post facto* laws. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443 (1883), *U.S. v. Henson*, 486 F.2d 1291 , (D.C. Cir. 1973). Other courts have held that a procedure change is not a violation for it operates only in "an unsubstantial manner to the persons' disadvantage." *Beazell v. State of Ohio*, 269 U.S. 167, 46 S.Ct. 68 (1925), *Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957), *Payne v. Nash*, 327 F.2d 197 (8th Cir. 1964).

Under Illinois Revised Statutes, 1961, Chapter 38, Section 807, effective January 1, 1962, "the Parole and Pardon Board shall establish rules and regulations, not inconsistent with this Act . . . and shall issue paroles in accordance with the provisions of this Act and of such rules and regulations adopted hereunder."

The express language of this statute and the courts over the years, in interpreting the Illinois Parole Statutes, have consistently ruled that the issuance of a parole in Illinois is at the discretion of the Parole and Pardon Board.[1] *People v. Kinney*, 30 Ill. 2d 201, 195 NE 2d 651 (1964) (interprets the Illinois Revised Statutes of 1961); *People Ex Rel Jones v. Brantley*, 259 NE2d 33 (1970) interprets the Illinois Revised Statutes of 1967); *People Ex Rel Tucker v. Kotsos*, 42 Ill. App. 3d 812, 356 NE2d 798 (1st Dist. 1976), (interprets the Illinois Revised Statutes of 1975).

The issuance of a parole was at the discretion of Parole & Pardon Board in 1961 and was still at the discretion of the Parole & Pardon Board in 1979. The new statute has not impinged on the Board's discretion. The enactment of Illinois Revised Statutes 1977 Chapter 38, Section 1003-3-5(c), only serves to clarify the Board's decision making process in issuing paroles and does not add to or subtract from what the Parole and Pardon Board may consider in making its decision. The Board could have, twenty years ago, considered the effect a parole would have on deterring potential criminals.

The United States Court of Appeals for the Seventh Circuit considered possible violations of the *ex post facto clause* in dealing with amendments to the Illinois Parole Act and found no constitutional violation due to the great discretion given to Parole & Pardon Board in Illinois:

> "Parole is a matter of clemency and grace. No federal constitutional question is involved in the administration of the Illinois Parole Act." *Faines v. Castle*, 226 F.2d 591 (7th Cir. 1955).

Due to this great discretion given to the Parole & Pardon Board, this Court cannot find that the petitioner was at a substantial disadvantage due to the change in the statute and so there was no violation of the prohibition against *ex post facto* laws.

Therefore, the Illinois Attorney General's Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

DATED: This 22 day of May, A.D. 1980.

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
February 10, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

GARY WELSH,
Petitioner-Appellant,

No. 80-1862 vs.

LARRY MIZELL,
Warden, Etc., and
TYRONE C. FAHNER,
ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division
No. CV 80-4104
William L. Beatty, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondents Mizell and Fahner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATE OF ILLINOIS
PRISONER REVIEW BOARD
JAMES R. IRVING Chairman

September 25, 1979

To: Gary Welsh C-06380 Vienna

The basis for the Board's decision denying you parole at this time is explained as follows:

> Parole is denied based on the extreme seriousness of the crime of murder. The Board believes your release at this time would deprecate the seriousness of the crime and promote disrespect for the law.

AFFIDAVIT

I, W. V. Kauffman, Jr., Executive Director of the Prisoner Review Board and keeper of the records thereof, attest that the attached documents are true and correct copies kept in the normal course of business in our individual inmate files.

Specifically, we have randomly located files of individuals who were denied parole prior to January 1, 1973, who were given reasons for their parole denials relating to the seriousness of their offenses. These were taken from the files of Edwin J. Conrad, Waldo Emmerson Granberry, Charles Abrams, and Cottrell Caldwell.

The undersigned has served in the present capacity since 1967. The Board, to the best of my recollection, began reciting reasons for its actions in late 1970, although it was not Statutorily required to do so until January 1, 1973.

/s/ W. V. Kauffman, Jr.
W. V. Kauffman, Jr.
Executive Director

Subscribed to and sworn before me this 14th day of September, 1981.

/s/ Rosemary Drehing
NOTARY PUBLIC

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717
(Inmate's name & number)
Hearing Date: March 1, 1971 — Stateville

When rendering its decision in the case of the above inmate, the Board members offered the following comments:

Because of the very serious nature of the crime, his previous criminal activity, the absence of any sense of guilt and consequently, remorse; the absence of insight into previous behavior, it is the feeling of the Board that he is not an acceptable risk for parole. The Board is fully aware that this is an excellent inmate within the institution and that he performs quite well here. Yet, the inmate's persistent denials of an especially heinous crime indicate somewhat to the Board the absence of rehabilitation.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717
(Inmate's name & number)
Hearing Date: March 1, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In reviewing this case, the Board wishes to acknowledge that there have been certain achievements made by this inmate during his incarceration. However, in reviewing the seriousness of the offense for which he was convicted and the sentence imposed by the Court, it would be the Board's order at this point that parole be denied.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Edwin J. Conrad #46717 — Stv.
(Inmate's name & number)
Hearing Date: November 2, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

The total lack of insight expressed by the inmate coupled with the seriousness of the offense causes the Board to feel that parole at this time would depreciate the seriousness of the offense.

The Board would suggest that Staff evaluate this man for possible placement in a therapy program that might enable him to develop insight into his own personal problems.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Waldo Emmerson Granberry #46678
(Inmate's name & number)
Hearing Date: April 7, 1971 — Stateville

When rendering its decision in the case of the above inmate, the Board members offered the following comments:

Because of the serious nature of these crimes, parole is denied.

The Board commends the inmate on his excellent adjustment and accomplishment, and encourages him to continue.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Waldo Emmerson Granberry—Joliet #46678
(Inmate's name & number)
Hearing Date: March 1, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In view of the extreme seriousness of the instant crimes, involving the taking of a human life and actual assaults, and in view of the lack of insight exhibited by the inmate in the interview situation, the Board finds that the inmate is not an acceptable risk for parole at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Charles Abrams, #54147, Stateville
(Inmate's name & number)
Hearing Date: February 29, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

The Board is aware of the inmate's accomplishment in the Malaria Program, Dr. Rappaport's Group Therapy and the educational field. The Board is also aware of the minimum security placement of the individual; however, the Board feels that his past record of involvement in law violation's starting when he was a juvenile coupled with his drug addiction and the seriousness of the present offense makes him an unsuitable risk for parole at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell 51713-J
(Inmate's name & number)
Hearing Date: November 10, 1970

When rendering its decision in the case of the above inmate the Board members offered the following comments:

Parole denied.

In view of the nature of the crime and the inmate's past record evidencing an assaultive behavior pattern and aggressive tendencies as well as the continued guarded prognosis, the Board does not feel that he is an acceptable parole risk at this time.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell #51713 Joliet Branch
(Inmate's name & number)
Hearing Date: November 11, 1971

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In cognizance of the fact that this inmate murdered his female companion, and in further recognition of the fact that he had shot a previous wife five times and had committed other threats and assaults upon women, it is the opinion of the Board that he is not an acceptable parole risk, and it is the order of the Board that parole be denied in the interest of the peace and tranquility of the community.

PAROLE AND PARDON BOARD

To: The Warden
From: The Parole & Pardon Board
In Re: Cottrell Caldwell Pontiac No. 32207
(Inmate's name & number)
Hearing Date: September 14, 1972

When rendering its decision in the case of the above inmate the Board members offered the following comments:

In view of the seriousness of the offense, other crimes of violence in his past & his lack of academic, vocational, counseling or therapeutic achievements, it is the finding of the Board that he is not rehabilitated & would not comply with reasonable conditions of parole at this time.

No. 74-288

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Appellee,* v. ANDREW HARPER, *Petitioner-Appellant.*	Appeal from the Circuit Court of Johnson County, Illinois Honorable Robert B. Porter, Judge Presiding

PER CURIAM

Petitioner-appellant, Andrew Harper, and John Holmes, Jr., were convicted jointly in Cook County of murder and were sentenced to death. On appeal, the Supreme Court reversed the convictions and remanded the cause for a new trial. *People v. Harper*, 35 Ill.2d 398, 223 N.E. 2d 341 (1967). Both were again convicted and sentenced to 30 to 50 years. Harper's sentence was to run concurrently with a sentence of 100 to 150 years imposed for a prior murder conviction.

Petitioner is currently incarcerated in the Illinois Department of Corrections Correctional Center, Vienna, Illinois. He made application to the Illinois Parole and Pardon Board for parole on both offenses. On December 12, 1973, his application for parole was denied by the Board. The Board stated that parole at that time would "deprecate the seriousness of the offense" and "would not deter the inmate or others from committing such serious offenses."

On March 22, 1974, appellant filed a *pro se* petition for a writ of habeas corpus in the circuit court of Johnson County alleging that the Parole and Pardon Board, in denying his application for parole, had applied a standard which did not exist at the time of his sentence and that, therefore, he remained incarcerated through the application of an *ex post facto* law. The circuit court held a hearing on the petition, at which the appellant was present, and on May 1, 1974, granted the People's motion to dismiss and denied the petition. This appeal followed.

The Office of the State Appellate Defender, Mt. Vernon, counsel petitioner on appeal, filed a motion pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), requesting leave to withdraw as counsel, alleging that no merit to the appeal exists. Counsel has provided this court with an extensive memorandum of law in support of its position and has served petitioner with copies of all documents. The appellant has requested that his petition for writ of habeas corpus filed in the Circuit Court be permitted to stand as his Brief and Argument on appeal.

We have carefully reviewed the record and agree with counsel that no merit exists. Appellant's petition sought a writ of habeas corpus pursuant to Ill. Rev. Stat. 1969, ch. 65, sec. 22(2) and (3). Examination of the petition reveals that the appellant relies solely on subsection (2), and alleges that, absent the wrongful application of an *ex post facto* law, he would be entitled to discharge. Assuming, *arguendo*, that an *ex post facto* law was applied by the Board in denying the appellant parole, he still would not be entitled to discharge. At most, he would be entitled only to reconsideration of his parole application. *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 258 N.E.2d 33 (1970). The appellant was entitled to have his application for parole considered under the proper standards or criteri. We are aware of *People ex rel. Weaver v. Lango*, 57 Ill.2d 67, 309 N.E.2d

531 (1974), wherein the court granted mandamus relief to one denied parole based on improper eligibility criteria. The Court noted, however, that the petitioner had been denied consideration *pro forma* and that the extent of his relief was consideration of his parole application on its merits. In the instant case, petitioner has been afforded the consideration provided by statute and Parole and Pardon Board regulations. Thus, neither habeas corpus nor mandamus relief is available. The motion of the State Appellate Defender to be allowed to withdraw as counsel on appeal is allowed and the judgment of the Circuit Court of Johnson County is affirmed.

AFFIRMED.

Publish Abstract only.

CONCUR: _____

Eberspacher, J. and Moran, J., not participating.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *ex rel.*
AARON OVERALL, JR.,

Petitioner,

vs. NO. 74 C 2541

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

MEMORANDUM OPINION

Petition for Writ of Habeas Corpus

Petitioner Aaron Overall is a state prisoner in the custody of the Department of Corrections of the State of Illinois pursuant to a 6 to 14 year sentence imposed by the Circuit Court of Cook County. The petitioner entered a plea of guilty to a reduced sentence of voluntary manslaughter in exchange for the sentence imposed.

Petitioner claims that at the time he accepted the consequences of his guilty plea one of the conditions of the sentence

---

United States ex rel. Aaron Overall v. Director, Dept. of Corrections 74C 2541.

Petitioner's application for a writ of habeas corpus is denied. First, we believe petitioner has construed former §203 of the parole statute in an unlikely and impermissibly narrow manner, and second, we find that petitioner's contention as to the voluntariness of his guilty plea must fall for failure to exhaust state remedies. Further, we hereby grant a certificate of probable cause should counsel wish to appeal the denial of his writ.

then imposed was that, after having served his minimum sentence and becoming eligible for parole, parole would be granted when the Parole Board had determined that petitioner was "capable again of becoming a law abiding citizen." Ill. Rev. Stat. ch. 108, §203 (1969). Subsequent to the entry of petitioner's guilty plea the parole statute was revised to permit the Parole Board to deny parole if it determined that release would "deprecate the seriousness of the offense." Ill. Rev. Stat. ch. 38, §1003-3-5 (c)(2) (1973).

In April, 1974, petitioner had become eligible for parole and appeared before the Parole Board for a hearing on the granting of parole. Petitioner was denied parole and was presented with the following statement:

> The Board in considering this case feels that parole at this time would deprecate the seriousness of the offense and would not deter the inmate nor others from committing such serious violations of the law in the future.
>
> It is therefore the order of the Board that parole be denied, continued to the April 1975 docket. The Board would recommend and encourage the inmate to become involved in the educational programs offered within the institution, more specifically the GED program.

Petitioner sought reconsideration from the Parole Board and argued that the promise to him that he would be paroled when he had demonstrated his capability of being a "law abiding citizen" was an essential part of the plea negotiation. The request for reconsideration was denied.

Petitioner claims he has been the victim of two unconstitutional wrongs: 1) petitioner was denied release on parole through arbitrary action and application of an *ex post facto* law,

and 2) the application of the general deterrence ground for denial of parole to petitioner vitiated the voluntariness of his plea of guilty.

I.

The claim that petitioner's parole denial is unconstitutional as being arbitrary and an application of an *ex post facto* law is developed in two steps. First, petitioner argues that to the extent that the denial was founded on the rationale that he might commit another offense, this rationale is totally unsupported by the facts before the board; hence, denial of parole on this unsupported ground was an arbitrary and capricious act, contrary to due process of law. Second, the only basis for denial of parole which is supported by facts before the Parole Board is the general deterrence rationale that "release at this time would not deter others . . . from committing similar offenses in the future . . ."; however, the application of the general deterrence rationale to petitioner constitutes an *ex post facto* law in violation of Article 1, Section 10 of the U.S. Constitution. Inasmuch as we disagree with the second step of petitioner's argument, we shall assume — without deciding — the correctness of the first step.

In 1969 when petitioner was sentenced for voluntary manslaughter, the penalty for this offense was imprisonment in the penitentiary for from one to twenty years. Ill. Rev. Stat. ch. 38, §9-2(b) (1969). Plaintiff contends that in 1969 only the sentencing judge was empowered to impose punishment on a general deterrent theory; the judge could set a minimum sentence almost as high as the maximum sentence, with the view that the minimum sentence could be set in conformity with the judge's feelings regarding the necessary minimum length of incarceration required to serve the general deterrent effect of criminal sanctions. As of 1973, though, for a class 2

felony the sentencing judge could not set a minimum sentence to exceed one-third of the maximum sentence. Ill. Rev. Stat. ch. 38, §1003-3-3. Plaintiff argues that part of the trial judge's discretion has been delegated to the parole board, which itself is now vested with the power to apply its own view of general deterrence in denying parole.

To further bolster his argument regarding the bifurcated sentencing scheme of judge/parole board and rehabilitation versus deterrence, petitioner points to Rule 12 of the Parole and Pardon Board of the State of Illinois, in effect from 1962 to 1972, as evidence that the Parole Board was restricted to considerations of rehabilitation during the relevant years prior to 1973. The rule provides:

> If the members of the Parole and Pardon Board in conference determine that a prisoner serving an indeterminate term is entitled to parole, they shall enter an order for parole. If they determine that a prisoner is not a fit person to serve his sentence outside the penitentiary, a parole shall be denied, and such further orders entered as in the judgment of the members is deemed warranted.

While we concede the ingenuity of petitioner's counsel, we believe the scheme concocted is more "wishful thinking" than actuality. Nothing in the legislative history of Ill. Rev. Stat. ch. 38, §1003-3-5, speaks of shifting the consideration of factors of general deterrence from the trial judge to the Parole Board, nor would one expect to find such comments. Sentencing — be it by a judge or indirectly by a parole board — cannot be spliced into separate factors capable of independent consideration. Just as a judge could never realistically ignore the factor of rehabilitation in reaching his sentence, so could a parole board not ignore the deterrent effect of its decisions. It is inconceivable to this court, and in defiance of common sense, to impose such an interpretation on Ill. Rev. Stat. ch.

108, §203 (1969), the controlling parole statute in effect at the time of petitioner's sentencing. Surely the Illinois legislature never intended that the Parole Board be barred from considering the deterrent effect when deciding cases of release on parole.

In examining the Council Commentary which accompanies Ill. Rev. Stat. ch. 38, §1003-3-5, one notes that the new parole criteria "expand the vague charge to the Board to determine 'whether [the offender] is capable again of becoming a law-abiding citizen.'" While petitioner reads this remark as meaning that §203 has been enlarged to include the general deterrence rationale, the court thinks it quite clear that the new statute only makes more explicit the vague charge under which the Board labored.

Petitioner argues that any construction of §203 which would expand it to include the general deterrence rationale of present law would be an "unforeseeable judicial enlargement" of prior law, and operate precisely as an *ex post facto* law. *Bouie v. Columbia*, 378 U.S. 347, 357 (1964). We believe that our construction of §203 is not only not "unforeseeable", but the predictable and sensible one, given the nature of sentencing.

Petitioner's application for a writ of habeas corpus on this ground is denied.

II.

Petitioner also argues that he is in custody illegally as a result of an involuntary guilty plea. Overall claims that one of the conditions upon which he accepted the plea-bargaining agreement was that he be paroled, upon eligibility, if he had demonstrated that he was rehabilitated.

We agree with petitioner that when a guilty plea rests in any significant way upon a promise or agreement of a prosecutor or judge so that the same can be said to be a part of the inducement or consideration, the promise must be fulfilled. A plea of guilty made in reliance on an unfulfilled promise is not voluntarily made by the defendant. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971). However, we decline to rule on this point because of petitioner's failure to exhaust state remedies.

Petitioner claims that he has no effective state remedy to exhaust because the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, §122 *et seq.* (1973) applies only to "criminal proceedings", which do not include parole. However, this aspect of petitioner's writ is not really about his denial of parole, but rather challenges validity of his guilty plea at his criminal trial.

As the court understands petitioner's argument herein, the construction of §203 becomes irrelevant. If Overall was promised, as a part of his consideration in the plea-bargaining contract, that he would be paroled upon eligibility if he was at that point rehabilitated, then the Parole Board was barred from considering the deterrence rationale whether they otherwise had the power to do so or not. Therefore, petitioner is not seeking herein a review of the Parole Board determination, or another re-hearing, but he seeks rather to vitiate his guilty plea because of an unfulfilled promise.

The law of Illinois is relatively clear that the Post-Conviction Hearing Act encompasses the challenge of the voluntariness of a guilty plea, even though the unfulfilled promise resulted at a proceeding years later. In *People v. Pier*, 51 Ill. 2d 96, 281 N.E.2d 289 (1972), the court examined the voluntariness of a guilty plea at a probation vocation hearing. The court said that "a defendant may raise in a post-conviction

petition issues of constitutional dimension that occurred not only in the proceeding which involved the determination of his guilt, but also those which arose in proceedings concerning the imposition of the sentence." *People v. Pier*, *supra* at 290.

To the extent that petitioner's claim for relief is based upon an unfulfilled promise in the plea bargain creating an involuntary guilty plea, we hold that petitioner has an unexhausted state remedy in the Post-Conviction Hearing Act. The petition for writ of habeas corpus is hereby denied.

Finally, we note that Overall is to appear before the Parole Board in April, 1975, and that petitioner may wish to expedite an appeal to avoid problems of mootness. Pursuant to F.R.A.P. Rule 22(b), 28 U.S.C.A., we hereby issue a certificate of probable cause in case petitioner should decide to pursue that course.

ENTER:

/s/ Abraham Lincoln Marcom
JUDGE

DATED: December 6, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK WARE and
ELIZABETH WARE,
Plaintiffs,

v.

K. V. KAUFMAN, IRVING R. JAMES and GAYLE FRANZEN,
Defendants.

No. 80 C 3209

MEMORANDUM OPINION

Plaintiffs are prisoners in the custody of the State of Illinois. Frank Ware is serving concurrent sentences of 25-30 years for aggravated kidnapping and 10-20 years for rape. Elizabeth Ware is serving concurrent sentences of 20-30 years for aggravated kidnapping and 7-14 years for deviate sexual assault. Both convictions for both plaintiffs relate to the same incident in 1969. *See People v. Ware*, 11 Ill.App.3d 697, 297 N.E.2d 289 (1973). The Illinois Prisoner Review Board has twice refused to release plaintiffs on parole. The second parole denial for Elizabeth Ware occurred in March 1980; the second parole denial for Frank Ware occurred in December 1980.

In this section 1983 suit, plaintiffs allege that the Board failed to give a sufficient factual basis for the parole denials as required by the due process clause; that, in violation of the ex post facto clause, the Board applied a criterion to deny parole which was not effective at the time plaintiffs committed their crimes; that Kaufman's function as the Executive Director of

the Board is unlawful; and that defendants' failure to award plaintiffs both statutory and day-for-day good conduct credit violates the constitution. Defendants have filed a motion to dismiss. For the reasons hereinafter stated, we grant defendants' motion.

I.

A

The Illinois statutory guidelines for parole determinations are in section 3-3-5(c) of the Unified Code of Corrections.

> (c) The [Prisoner Review] Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

38 U.S.C. §1003-3-5(c). The administrative rules of the Board define the factors to be considered in making each of those findings. For example, a determination that release of the candidate for parole "would deprecate the seriousness of his offense or promote disrespect for the law" must be "based on one or more of the following factors:"

> 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.

2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

To notify a prisoner of a decision to deny parole, the Board sends a form notice listing the three reasons given in the statute and the considerations defined in the regulations and checks the reason and factor or factors which were the bases for the denial of parole. In plaintiffs' case, the Board marked that their release would deprecate the seriousness of the offense or promote disrespect for the law and indicated that this determination was based on the offenses committed by plaintiffs (aggravated kidnapping, rape, deviate sexual assault).

Plaintiffs argue that the Board's use of this checklist, which merely recites the statutory and regulatory language and does not provide a more specific statement of facts supporting the denial, violates the due process clause. Plaintiffs seek as relief a "written statement by the fact-finders as to the evidence relied on and reasons" for the denial of parole. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (due process requirements for parole revocation).

Even if plaintiffs have a constitutionally protected interest in their parole determination,[1] due process does not require

---

[1] A constitutionally protected interest in parole determinations does not result from the possibility of parole but depends upon the language of the state parole statute. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 8-12 (1979). In *Greenholtz*, the Supreme Court accepted the inmates' argument that the necessary expectancy of parole was created by the Nebraska statute's requirement that an inmate "shall" be paroled "unless" certain findings were made. 442 U.S. at 11-12. The Illinois statute is not structured in that affirmative fashion. No set of facts are defined which mandate a decision favorable to the prisoner. The statute does not say an inmate "shall" be released under any condition but only defines when he shall not be. Because of the almost total discretion given to the Board, a parole determination in Illinois does not necessarily trigger due process protections.

the Board to elaborate on the reasons for denying parole. *Greenholtz v. Inmates of the Nebraska Penal and Corrections Complex*, 442 U.S. 1 (1979). The court of appeals in *Greenholtz* had held that "'each inmate to whom parole is denied must be given a full and fair explanation in writing, of the evidence relied upon and the reasons for denial of parole.'" *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz*, 576 F.2d 1274, 1284 (5th Cir. 1978) (quoting the district court). In reversing that holding, the Supreme Court stated that to require a parole board to specify the particular evidence in the inmate's file or at his interview on which it rests the denial "would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilty determination." 442 U.S. at 15-16. After "the full panoply of due process" at the trial preceding the imprisonment, the Court reasoned that an adversary hearing is not necessary to deny parole and continue confinement. *Id.* at 14. Moreover, emphasizing that "due process 'is flexible and calls for such procedural protections as the particular situation demands,'" *id.* at 12, quoting *Morrissey v. Brewer*, 408 U.S. at 481, the Supreme Court held that a requirement of a full explanation is inimicable to the parole determination which is necessarily subjective in part and predictive in part," 442 U.S. at 13, and not necessarily based on specific facts. *Id.* at 14.

Although in this case the Illinois parole procedures are involved and not the Nebraska procedures which were at issue in *Greenholtz*, the Supreme Court's decision in *Greenholtz* that a summary of the evidence relied on to deny parole was not required by due process is controlling here. *Greenholtz* was based on the "very broad discretion" granted the paroling authority in the Nebraska statute. 442 U.S. at 13. Since the Illinois statute also gives great discretion to the Illinois Prisoner Review Board, *see, e.g., Tucker v. Kotsos*, 42 Ill.App.3d 812, 818, 356 N.E.2d 798, 804 (1976), the rationale of *Greenholtz*

applies to defeat the claim that a written statement of the evidence and reasons relied on for the denial are essential to due process.

None of the case or statutory authority which plaintiffs cite in their argument is applicable to this suit. Some of the cases were decided prior to *Greenholtz*, and, however persuasive we may find their rationale for requiring a full explanation for parole denials, the Supreme Court's contrary decision in *Greenholtz* controls our determination in this case. Some of the cases on which plaintiffs rely involve the procedures before the federal parole board. Those cases are not relevant to plaintiffs' claim because they were decided not on the basis of the due process clause which is the only authority applicable to plaintiffs' claim but on the basis of the federal statute which creates the statutory rights of federal prisoners but does not define the constitutional rights of state prisoners. Even if, as plaintiffs argue, the Board's checklist violates the Illinois statute and regulations which require a "concise statement of facts supporting the reason or reasons" for denying parole, Rule Governing Parole, p. 7, plaintiffs do not state a claim for violation of a federally protected right; violation of a state procedural rule does not result in a federal cause of action under section 1983 where, as here, the state procedure is not mandated by the federal constitution. Because due process does not require a summary of the facts which led to a denial of parole, we dismiss that count of the complaint.[2]

---

[2] In their memorandum in opposition to defendants' motion plaintiffs charge that they were denied parole because of Frank Ware's efforts to bring prison conditions and other problems to the attention of journalists, legislators, and others. A decision to deny parole "made in retaliation against or so as to hinder the exercise of federally protected rights" is actionable. *Williams v. Rhoden*, 629, F.2d 1099, 1103 (5th Cir. 1980).

continued on next page

II.

Plaintiffs contend that defendants violated the ex post facto clause by deciding the question of plaintiffs' parole release on the basis of provisions concerning parole which were not in effect when plaintiffs' committed their crimes. Plaintiffs argue that the parole criteria listed in the new statute are substantive changes from the criteria formerly applied by the paroling authority. Specifically, they challenge the statute's requirement that the Board deny parole if the prisoners' "release at this time would deprecate the seriousness of his offense or promote disrespect for the law ..." Ill.Rev.Stat., ch. 38, §1003-3-5(c). An alteration of role provisions violates the ex post facto clause if it is "retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 101 S.Ct. 960 (1981).

In an earlier habeas corpus petition brought by plaintiff Elizabeth Ware, we rejected the ex post facto claim raised by plaintiffs in this suit.

> The adoption of statutory parole release guidelines that do not significantly alter the discretion afforded parole authorities under prior law does not violate the prohibition against ex post facto law. *Rifai v. United States Parole Commission*, 586 F.2d 695, 699 (9th Cir. 1978); *see Shepard v. Taylor*, [556 F.2d, 648, 654 (2nd Cir. 1977)]. Therefore, we must examine the law as it existed when petitioner committed her crime to determine if Illinois parole authorities were

---

continued from previous page

However, since a determination that plaintiffs were unconstitutionally denied parole would result in their release, plaintiffs' claim must be brought in a habeas corpus petition, *Preiser v. Rodriguez*, 411 U.S. 475 (1973), unless plaintiffs can factually amend their complaint to seek monetary damages only for the alleged unconstitutional parole denial.

empowered to consider the nature of a prospective parolee's offense as a factor in its parole release decisions.

In 1969, the Illinois statute governing parole set forth a definite formula for determining when a prisoner became eligible for parole release consideration. Ill.Rev.Stat., ch. 38, §123-3 (1967) (repealed). Once a prisoner reached her eligibility date, she had a right to have her application for parole release entertained by the Illinois Parole and Pardon Board ("Pardon Board"), the predecessor of the Review Board. *People ex rel. Abner v. Kinney*, 30 Ill.2d 201, 206, 199 N.E.2d 651, 654 (1964). But the Parole Board was not obliged to grant parole to every prisoner who attained eligibility for parole release consideration. Indeed, an Illinois prisoner had no enforceable right to be paroled any time prior to the expiration of her sentence. *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 338, 259, N.E.2d 651, 654 (1970). The decision as to when to grant parole to an eligible prisoner was left to the broad discretion of the Parole Board. Ill.Rev.Stat., ch. 38. §123(1)(a)(1967) (repealed); *see People ex rel. Jefferson v. Brantley*, 44 Ill.2d 31, 33, 253 N.E.2d 378, 380 (1969).

Although no statutory guidelines delineating specific reasons for the denial of parole existed before the enactment of the Code, the severity of the crime was, by statute, one of the factors the Parole Board could consider in deciding whether a prisoner was ready for release into society. Under Ill. Rev.Stat., ch.108, §203 (1967) (repealed), the sentencing judge and prosecuting attorney were required to prepare for the Parole Board's review an

official statement of the facts and circumstances surrounding the crime for which a committed offender was convicted. This official statement was furnished to the Parole Board to assist it in the exercise of its discretionary authority to determine whether a person in custody was "capable again of becoming a law-abiding citizen." It is thus clear that the inclusion of seriousness of the offense among the standards for the denial of parole under the Code did not significantly increase the power of Illinois parole authorities; it merely clarified the discretionary power already delegated to the Parole Board under prior law. Therefore, finding that petitioner has not suffered greater punishment as a result of the 1973 parole release guidelines, we reject her claim that she was denied parole on the basis of an *ex post facto* application of state law.

Ware v. Geesen, No. 80 C 5427, p. 4-6 (N.D.Ill. Dec. 4, 1980). For the reasons stated in that previous opinion, we dismiss the count of the present civil rights complaint which alleges that retrospective application of Ill. Rev. Stat., ch. 38, §1003-3-5(c) violates the ex post facto clause.[3]

III.

Plaintiffs' claim that defendant Kaufman's position as Executive Director of the Illinois Prisoner Review Board renders

---

[3] Plaintiffs also seem to complain that the ex post facto clause was violated beacuse the body which made the decision on parole was changed from the Parole and Pardon Board, in existence at the time plaintiffs committed their crime, to the new Illinois Prisoner Review Board. Such a nomenclature, procedural, nonsubstantive claim could not violate the ex post facto clause.

the Board unlawfully constituted has no merit. Their basis for that claim is a letter signed by Kaufman notifying Frank Ware that his request for review of the Board's parole denial had been rejected. Plaintiffs claim the letter should have been answered by the Chairman of the Board. The body of the letter says:

> Your request for a rehearing was presented to the members of the Board for consideration.
>
> After careful review of your request, along with the entire file in the matter, it was determined that further consideration is not warranted at this time. The reason for denial is as follows: "The Board finds the information submitted does not require a rehearing."

Memorandum of Law in Support of Defendants' Motion to Dismiss or for Summary Judgment, Exhibit 3.

The letter from Kaufman to Frank Ware makes clear that Kaufman was merely acting as the Board's messenger not usurping the authority of the Chairman of the Board or impeding the Board's independent decision-making process. The decision was the Board's not Kaufman's. Kaufman's role was simply to notify Ware of the Board's decision. Furthermore, plaintiffs do not have a constitutional right to have their letters from the Board signed by the Chairman nor to have the Board or the Chairman consider their request for a rehearing. Plaintiffs' claim is frivolous.

IV.

Plaintiffs argue that defendants have not deducted from plaintiffs' sentences the amount of good time credit to which they are entitled. They claim they should receive both statutory

good time, as provided by the statute in effect when they committed their crimes, and day-for-day good time, as provided by the statute in effect at present and since February 1, 1978.

Under the old statute,

> [t]he Department was required to prescribe, at a rate within its discretion, a schedule of good-conduct credits for good behavior .... These were known as "statutory good time credits." The Department was also empowered to award good-conduct credits to prisoners who performed work assignments or participated in other Department programs ... These credits were known as "compensatory good time credits."

Johnson v. Franzen, 77 Ill.2d 513, 397 N.E.2d 825,827 (1979). Effective February 1, 1978, the new statute changed the method for computing good time.

> The Code no longer gives the Department authority to award compensatory good-conduct credits ... and no longer gives the Department the authority to award statutory good-time credits at a discretionary rate ... The Code expressly directs the Department to prescribe rules and regulations providing for good-conduct credits on a day-for-day basis. (Ill. Rev. Stat., ch. 38, §1003-6-3).

Id. at 516, 397 N.E.2d at 826. In *Johnson v. Franzen*, the Illinois Supreme Court held that, for time served after February 1, 1978, defendants must give day-for-day credit to prisoners like the plaintiffs who committed their crimes before that provision was enacted as well as to prisoners who violated the law after the statute became effective. *Id.* at 522, 397 N.E.2d at 828. According to an affidavit filed by defendants, plaintiffs' sentences have been recomputed in accordance with that opinion.

Nothing in the statute or in *Johnson v. Franzen*, entitles plaintiffs to both statutory good time credit as defined by the old statute *and* day-for-day good time credit as prescribed by the new statute. Plaintiffs argue that the new legislation could not take away their right to statutory good time credit, but the new provision did not revoke their right to good time, it only changed the method for crediting good time by taking away the Department's discretion and establishing a rate of one day of good time credit for one day of imprisonment.

Furthermore, such a change does not necessarily violate the constitutional prohibition against imposing additional punishment to that prescribed at the time the crime was committed which is contained in the ex post facto clause. A state can alter the method of awarding good time and apply the new method to prisoners who committed crimes before the change if the effect of the new rule is not more onerous than the law in effect on the date of the prisoner's offense. *Cf. Weaver v. Graham*, 101 S.Ct. 960 (1981) (Florida Statute reducing the amount of good time available for good conduct is unconstitutional when applied retroactively).

Plaintiffs do not allege that a system of day-for-day good time credit is less beneficial to them than the system of statutory and compensatory good time previously administered by the Department nor would such an argument withstand analysis. The old system of statutory good time provided for less than day-for-day credit, and the system of compensatory good time provided a maximum credit of only seven and one-half days per month. *Johnson v. Franzen*, 77 Ill.2d at 517, 397 N.E.2d at 827. Furthermore, according to an affidavit filed by the defendants, if recomputing good time according to the dictates of *Johnson* would for some reason have resulted in less credit than that already awarded a particular prisoner under the old method, the day-for-day rate was not applied for the time prior to the *Johnson* decision. Since the new system does not reduce the

amount of good time available, application of the day-for-day rate only is not unconstitutional.[4]

In light of the foregoing, defendants' motion to dismiss is granted. An appropriate order will be entered.

/s/ _____
United States District Judge

DATED: October 13, 1981

---

[4] Plaintiffs contend in addition, however, that white prisoners were granted both statutory and day-for-day good time credits while black prisoners were not. Although defendants are not required to grant both types of good time to any prisoner, they cannot give both types to some prisoners and refuse to give both to others in an arbitrary or racially discriminatory manner. If plaintiffs can prove discrimination, they may be able to receive more good time on the same basis as white prisoners. That relief, since it would shorten the length of their confinement, cannot be granted in a section 1983 suit but must be the basis for a habeas corpus petition. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Plaintiffs may, however, recover monetary damages for the violation of their equal protection rights in a section 1983 suit. Plaintiffs may amend their complaint to allege the facts, if they can do so, on which they base the conclusion that identified officials granted white prisoners both statutory and day-for-day good time credits, seek such monetary relief only, and name the appropriate officials and white prisoners.

NO. 81-2105

Supreme Court, U.S.
FILED
JUL 20 1982
Alexander L. Stevas, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden,
Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jerold S. Solovy
Laura A. Kaster
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent,
Gary Welsh

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ADDITIONAL STATUTE INVOLVED	iv
RESPONDENT'S STATEMENT OF THE CASE	1
CERTIORARI SHOULD NOT BE GRANTED	4
A. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND INVOLVED NO NEW ISSUE OF LAW	4
1. The Seventh Circuit Correctly Ruled That The 1962 Law Limited The Parole Board To Considering Whether The Prisoner Was Rehabilitated	5
2. The Seventh Circuit Correctly Ruled That The 1973 Law Impaired Parole Eligibility By Adding A Criterion Not Present In 1962	8
3. The Pre-Weaver Illinois Cases Do Not Support The State's Construction Of The Parole Statutes	12
B. THERE IS NO CONFLICT WITH ANY DECISIONS OF OTHER CIRCUITS	14
C. THE SEVENTH CIRCUIT DECISION CREATES NO HARDSHIP IN THE STATE OF ILLINOIS NOR ANY POTENTIAL FOR DANGER TO SOCIETY	18
CONCLUSION	19
APPENDIXES	1a et seq.

TABLE OF AUTHORITIES

	PAGE
Alvarado v. McLaughlin, 486 F.2d 541 (4th Cir. 1973), remanded for reconsideration sub nom. McLaughlin v. Priesto, 418 U.S. 903 (1974)	10
Calder v. Bull, 3 U.S. [3 Dallas] 386 (1798).	5
DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978)	17
Dobbert v. Florida, 432 U.S. 282 (1977)	9
Farmer v. United States Parole Commission, 588 F.2d 54 (4th Cir. 1978), cert. denied, 442 U.S. 943 (1979).	14
Geraghty v. United States Parole Commission, 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980)	14
Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980)	12-13
Kring v. Missouri, 107 U.S. 221 (1882).	5,19
Lindsey v. Washington, 301 U.S. 397 (1937).	5,9,13
Marshall v. Garrison, 659 F.2d 440 (4th Cir. 1981)	7,17
People v. Harper, 27 Ill.App.3d 406, 327 N.E.2d 91 (5th Dist. 1975)	12-13
People v. Lillie, 79 Ill.App.2d 174, 223 N.E.2d 716 (5th Dist. 1967)	6,8
People v. Moore, 133 Ill.App.2d 827, 272 N.E.2d 270 (5th Dist. 1971)	6
People v. Welsh, 30 Ill.App.3d 887, 333 N.E.2d 572 (2d Dist. 1975)	1,2
Portley v. Grossman, 450 U.S. 962 (1981) remanding 605 F.2d 563 (9th Cir. 1979)	11,18
Portley v. Grossman, 444 U.S. 1311 (Rehnquist, Circuit Justice, 1980)	11
Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978)	14,17
Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979)	10
Ruip v. United States, 555 F.2d 1331 (6th Cir. 1971)	14,15
Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977).	16-17

PAGE

United States v. Addonizio, 442 U.S. 178 (1978) 18

United States v. Ferri, 652 F.2d 325 (3d Cir. 1981) . . . 14

United States ex rel. Overall v. Director, No. 74 C 2541 (N.D. Ill), aff'd without opinion, 513 F.2d 634 (7th Cir. 1975) 13

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 18

Warden v. Marrero, 417 U.S. 653 (1974). 10

Ware v. Kaufman, No. 80 C 3209 (N.D.Ill. 1981) rev'd on rehearing (March 16, 1982) 13

Warren v. United States Parole Commission, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1454 (1982) 14,15-16

Weaver v. Graham, 450 U.S. 24 (1981). . . . . passim

Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) . . . . . passim

Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979) 14,15

STATUTES

Ill.Rev.Stat. Ch. 38, §1003-3-5(c)(2)(1973) 2,4,8-9, 11-12

Ill.Rev.Stat. Ch. 38, §806 (1962) 2,5-6,8

18 U.S.C. §4203(a)(1964) 14-15

18 U.S.C. §4201 et seq. (1976) 15

18 U.S.C. §4206 (1976) 15,16

OTHER AUTHORITIES

C. B. Sussman, The Illinois Parole and Pardon Board, Its Structures, Duties and Responsibilities, 49 Chi.B.Rec. 200 (1968) 7

T. Gregory, Parole, 35 Chi.B.Rec. 7 (1953). 7

State of Illinois, Dept. of Pub. Safety, Parole & Pardon Board, Rules and Statutes Relating To Parole and Pardons (June 1, 1962) 7

State of Illinois, Prisoner Review Board, Rules Governing Parole, 3 Ill. Admin. Reg. Issue 1 at 144-169 (1978) 11

ADDITIONAL STATUTE INVOLVED

38 Ill.Rev.Stat. §806 (1962) provides in relevant part:

> Official Statement-Filing-Transmitting to Parole and Pardon Board or the Youth Commission-Report of receipt of prisoner or ward. § 6. In all cases, whether the sentence be definite or indeterminate, the judge by or before whom any prisoner or ward is convicted or committed, and also the State's Attorney of the county in which he or she was convicted or committed shall file an official statement with the clerk of the court to be transmitted to and to thereby furnish the Parole and Pardon Board or the Youth Commission, as the case may be, an official statement of the facts and circumstances constituting the crime or offense whereof the prisoner or ward was convicted or committed, together with all other information accessible to them in regard to the career of the prisoner or ward prior to the time of the commitment for the crime or offense of which he or she was convicted or committed relative to his or her habits, associates, disposition and reputation and any other facts and circumstances which may tend to throw light upon the question as to whether such prisoner or ward is capable again of becoming a law-abiding citizen: Provided, that the official statement herein required of the judge and the State's attorney need not include therein the evidence received after conviction as an aid to the court in fixing the minimum and maximum limits or duration of imprisonment as provided in Sections 2 and 3 of this Act, nor any conclusions or findings of fact resulting from such evidence.

NO. 81-2105

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden,
Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S STATEMENT OF THE CASE

In 1963, Gary Welsh was found unfit to stand trial on charges of rape and murder based upon events which took place in September, 1962. People v. Welsh, 30 Ill.App.3d 887, 887-88, 333 N.E.2d 572, 573 (2d Dist. 1975). Until 1973, he remained in state institutions. He was then found fit to stand trial. Id. His trial resulted in a conviction on the charge of murder and an acquittal of the rape charge. Id.[1/] Mr. Welsh was sentenced to 60 to 100 years at the state penitentiary. People v. Welsh, 30 Ill.App.3d at 887-88, 333 N.E.2d at 573.

1/ Respondent, by separate motion filed with this Court, has moved to strike the state's repeated prejudicial misrepresentations that he was convicted on the charge of rape. (Pet. 1, 14.)

Mr. Welsh has now served more than eighteen years of his sentence. See Id.

In 1962, when Mr. Welsh committed the offense, Illinois law required that a grant of parole turn on the "question as to whether [the] prisoner . . . is capable of again becoming a law abiding citizen," Ill.Rev.Stat. Ch. 38 §806 (1962). The focus of the law was on individual rehabilitation. In 1973, the paroling criteria were changed by the Illinois legislature and the Parole Board was required to deny parole if it determined inter alia that the release of the prisoner "would deprecate the seriousness of the offense or promote disrespect for the law . . ." Ill.Rev. Stat. Ch. 38 §1003-3-5(c)(2) (1973).

The basis for Mr. Welsh's habeas petition was his parole denial in 1979 when the Parole Board gave as its sole reason for denying parole that a grant of parole would "deprecate the seriousness of the crime and promote disrespect for the law." (R. 1 Exhibit 1.)[2/] This statement parrots the parole criterion first enacted into Illinois law in 1973. This provision was not present in the statutory law or the Parole Board Rules in 1962 when Mr. Welsh committed the offense.

The District Court's Decision

Mr. Welsh's petition for habeas corpus alleged that the denial of parole exclusively on the basis of a standard that was not in effect in 1962 violated the ex post facto clause of the United States and Illinois Constitutions. (R. 4.) The petition asserted that the 1973 statutory change made his punishment more burdensome by directing the

---

2/ The official Record is enumerated by item. Citations to the Record will therefore be to the item number and to the internal page of the item, "R. ___; ___."

Parole Board, for the first time, to deny parole on a basis other than an evaluation of the prisoner's rehabilitation and likelihood of being a law-abiding citizen. (R. 4.)

The district court dismissed Mr. Welsh's petition (R. 6), but issued a certificate of probable cause. (R. 11.) The district court's decision was based on the premise that the grant or denial of parole was a matter of clemency or grace both prior to and after 1973 and that the 1973 law did not impinge upon the Parole Board's discretion. (R. 6; 2-3.)

The Court of Appeals' Decision

Subsequent to the district court's ruling, this Court issued its decision in Weaver v. Graham, 450 U.S. 24 (1981). Weaver made it clear that ex post facto clause analysis does not turn on whether there is a "vested right" to parole. The ex post facto clause is violated when a law assigns more onerous penal consequences to an act than was imposed by law on the date of the offense. Weaver v. Graham, 450 U.S. at 30-31. The court of appeals reversed the district court decision in light of Weaver and a long line of ex post facto clause cases. Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982).

To reach its decision, the Seventh Circuit examined the law in effect in September 1962, at the time Mr. Welsh committed the crime for which he was sentenced. The statute in force at that time required the Parole Board to focus on the individual's rehabilitation, his progress toward being a non-violent, productive member of society. Welsh v. Mizell, 668 F.2d at 330.

The Seventh Circuit then compared the laws in effect in 1962 with the new Illinois Parole Law that became effective January 1, 1973, requiring denial of parole if

release of the prisoner would deprecate the seriousness of the offense or promote disrespect for the law. Ill.Rev.Stat. Ch. 38 §1003-3-5(c)(2) (1973). The statute mandated parole denial on the basis of this criterion alone, even if a prisoner were rehabilitated.

Relying on Weaver v. Graham, 450 U.S. 24 (1981), and numerous prior decisions of this Court, the Seventh Circuit concluded that Mr. Welsh had been subjected to a retrospective reduction in his eligibility for parole in contravention of the ex post facto clause. Under the old law, Mr. Welsh might have become entitled to parole by exemplary conduct. Under the new law, "no evidence of satisfactory rehabilitation can overcome finding that the nature of his crime makes him a socially undesirable candidate for parole." Welsh v. Mizell, 668 F.2d at 331. Indeed, the new provision was the exclusive basis for parole denial in Mr. Welsh's case. Id. (R. 1, Exhibit 1). The Seventh Circuit did not mandate a grant of parole for Mr. Welsh. Rather, the Seventh Circuit reversed the district court decision and the district court has since mandated a parole rehearing for Mr. Welsh on the basis of the 1962 standards. (Appendix A to this brief.) Mr. Welsh's parole rehearing pursuant to the mandate is scheduled for August of this year.

CERTIORARI SHOULD NOT BE GRANTED

A. THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND INVOLVED NO NEW ISSUE OF LAW.

To analyze whether a change in the parole statute impermissibly decreased Mr. Welsh's eligibility for parole in violation of the ex post facto clause of the Constitution, the Seventh Circuit was required to compare the statutory criteria that governed Parole Board decisions in 1962, when

Mr. Welsh committed the offense, with the criteria enacted in 1973, which the Prison Review Board applied to deny Mr. Welsh his parole.[3/] The Seventh Circuit properly concluded that the criteria had changed and that the standard applied to deny Mr. Welsh his parole, that his release at the time would deprecate the seriousness of the offense and promote disrespect for the law, was not a basis for parole denial in 1962. It is this conclusion about the operation of Illinois law which the State of Illinois contests. This case involves no question about the proper scope of the ex post facto clause as recently clarified in Weaver v. Graham, 450 U.S. 24 (1981).

1. The Seventh Circuit Correctly Ruled That The 1962 Law Limited The Parole Board To Considering Whether The Prisoner Was Rehabilitated.

To determine whether Illinois law has been changed retrospectively to make Mr. Welsh's punishment more burdensome, the Seventh Circuit first looked to the statute in force in 1962. Illinois Revised Statutes, Chapter 38, Section 806 (1962), provided the factors which the Parole Board was to examine. All of the factors, including the nature of the offense, were to be examined with an eye to determining whether the individual prisoner was rehabilitated and capable of rejoining society without presenting a substantial danger of recidivism. Section 806 (which the state failed to cite in its Petition) provided in relevant part:

> the judge . . . and also the States Attorney . . . shall . . . furnish the Parole and Pardon Board or the Youth Commission, as the case may be, an official statement of the facts and circumstances constituting

---

3/ The date of the commission of the crime is the starting point for ex post facto clause analysis. Weaver v. Graham, 450 U.S. 24, 30-31 (1981); Lindsey v. Washington, 301 U.S. 397, 400 (1937); Kring v. Missouri, 107 U.S. 221, 235 (1882); Calder v. Bull, 3 U.S. [3 Dallas] 386 (1798).

> the crime or offense whereof the prisoner or ward was convicted or committed, together with all other information accessible to them in regard to the career of the prisoner or ward prior to the time of the commitment . . . relative to his or her habits, associates, disposition and reputation and any other facts and circumstances which may tend to throw light upon the question as to whether such prisoner or ward is capable of again becoming a law abiding citizen . . . . (emphasis supplied.)

The Seventh Circuit also examined Illinois cases, that were decided when the 1962 statute was controlling and discussed the different roles of the sentencing judge and the Parole Board in 1962. In both People v. Lillie, 79 Ill. App.2d 174, 223 N.E.2d 716 (5th Dist. 1967), and People v. Moore, 133 Ill.App.2d 827, 272 N.E.2d 270 (5th Dist. 1971), the Illinois appellate court considered the pre-1973 law. At that time, the sentencing judge set both a minimum and a maximum sentence. The court expressly stated that the judge had the responsibility of considering general deterrence by imposing an adequate minimum sentence. Lillie, 79 Ill. App.2d at 178, 223 N.E.2d at 719; Moore, 133 Ill. App.2d at 829, 272 N.E.2d at 271. The maximum sentence was intended to be a prognostication of the outer boundary of time required to achieve rehabilitation. The Parole Board was obligated to mediate between the extremes to determine as a matter of observation and informed expertise "to what extent incarceration has achieved rehabilitation." Id. It had no jurisdiction to consider general deterrence.4/

As the Seventh Circuit noted, the focus on rehabilitation was also reflected in the regulations issued by

---

4/ The state challenges the Seventh Circuit's reliance upon these cases because they did not deal directly with questions of parole. (Pet. 17.) Lillie and Moore held minimum sentences excessive. Both cases were intimately involved with the nature of the sentencing process and clearly establish the court's understanding of the applicable law both as to the duties of the sentencing judge and the duties of the Parole Board. Petitioner has cited no contrary Illinois authority.

the Parole Board which directed the Board to deny release only "[i]f they determine that the prisoner is not a fit person to serve his sentence outside the penitentiary." State of Illinois, Dept. of Pub. Safety, Parole & Pardon Bd., Rules and Statutes Relating To Parole and Pardons, 22 (effective June 1, 1962); Welsh v. Mizell, 668 F.2d at 330. The Seventh Circuit's view of the operation of the 1962 law is also confirmed by contemporaneous authorities. T. Gregory, Parole, 35 Chi.B.Rec. 7 (1953); C. B. Sussman, The Illinois Parole and Pardon Board, Its Structures, Duties and Responsibilities, 49 Chi.B.Rec. 200 (1968).[5/]

The petitioner argues to this Court, as it argued below, that whatever the statutory boundaries for Parole Board determinations, they could not be effective because in 1962 the Parole Board gave no statement of reasons for its decisions. (Pet. 10-11.) The statutory language is clear. There were limits on the Parole Board's authority. If the Parole Board ignored clear statutory language, its construction of the law is entitled to no weight. Marshall v. Garrison, 659 F.2d 440, 444 (4th Cir. 1981).

The state, in an effort to elevate the importance of this case, seriously mischaracterizes the Seventh Circuit's holding regarding the construction of the 1962 law. The

---

5/ To support the contrary contention that pre-1973 decisions considered general deterrence, the petitioner submits to this Court materials contained in Appendix E which were not before the district court and which were rejected by the court of appeals when the petitioner attempted to file them after referring to them in oral argument. Only one of the Pardon Board Rulings appears to be based exclusively on the nature of the offense (Petition at 30a) and it was rendered on March 1, 1972, when the Illinois legislature had considered the new standards. Mr. Welsh's basis for objecting to the filing included material inaccuracies in the affidavit and the fact that inferences drawn from the documents were subject to dispute. The court of appeals specifically ruled by order dated October 28, 1981 that these materials "are not suitable for judicial notice in this appeal." The respondent has made a separate motion to strike Appendix E on this basis.

state repeatedly asserts that the decision precludes consideration of the "seriousness of the offense" (e.g., Pet. 14, 16, 21) and requires the state to release heinous criminals.[6/] This is not the case. The Welsh decision requires that the Parole Board consider, as the 1962 statute dictates, whether the prisoner has been rehabilitated and no longer presents a serious threat to society. The nature of the offense may, of course, be considered in that context. Such consideration is indeed mandated in Section 806 which requires the Parole Board to consider the prisoner's record "to throw light upon the question as to whether such prisoner . . . is capable of again becoming a law abiding citizen." See People v. Lillie, 79 Ill.App.2d at 178-79, 223 N.E.2d at 716-19. The Seventh Circuit held that for those prisoners who admitted crimes prior to 1973, the Parole Board must continue to focus on the individual prisoner's rehabilitation; the premise of the decision-making process may not be changed retrospectively to deny parole on the basis of societal concern about general deterrence.

2. The Seventh Circuit Correctly Ruled That The 1973 Law Impaired Parole Eligibility By Adding A Criterion Not Present in 1962.

The Seventh Circuit compared the 1962 statutory standards to those enacted in 1973 (Ill.Rev.Stat. Ch. 38 §1003-3-5(c)) which specifically state, inter alia, that "the Board shall not parole a prisoner eligible for parole if it determines that: . . . (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law. . . ." (Emphasis supplied.) It was

---

6/ The amicus also refers to its concern that the "seriousness of the offense" may not be considered under the Seventh Circuit's decision. (Amicus Brief at 2.)

this criterion, not present in the 1962 law, which was the sole reason given for Mr. Welsh's parole denial.

The petitioner erroneously asserts that the issue the Seventh Circuit considered was whether the 1973 law for the first time permitted the Parole Board to consider the "seriousness of the offense." (Pet. 14-16.) By omitting the word "deprecate," which is present in the statute, the state confuses the Seventh Circuit's holding. What the Seventh Circuit in fact held was that the new criterion requiring parole denial if the Board found release would "deprecate the seriousness of the offense" created new authority for the Parole Board. The 1973 Act requires the Parole Board to consider the impact of release on the public at large. Under the new criterion in the 1973 statute, the offense itself may automatically disqualify the prisoner for release until a fixed period of time has been served. Denial of parole may occur even if the prisoner is rehabilitated and therefore would have been paroled under the 1962 Act.7/

Although the state can alter its penological philosophy prospectively, a retrospective change in the law is prohibited. The state may reject the rehabilitation model which was the underlying premise of the 1962 law. But, the state may not apply altered rules retrospectively consistent with the ex post facto clause's prohibition. This is the essence of the Seventh Circuit's ruling.

7/ The amicus argues that Mr. Welsh might have been denied parole under the 1962 standards (Amicus Brief at 3). This Court has repeatedly held, however, that the issue is whether there has been an increase in the possible penalty "regardless of the length of the sentence actually imposed." Lindsey v. Washington, 301 U.S. 397, 401 (1937). The ex post facto clause prohibits laws which potentially--as well as actually--make punishment more onerous. Dobbert v. Florida, 432 U.S. 282, 300 (1977).

The Seventh Circuit's ruling is fully consistent with prior decisions of this Court which recognized that a reduction in opportunity for early release would disadvantage the prisoner. For example, in Warden v. Marrero, 417 U.S. 653, 662-63 (1974), this Court recognized that a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the ex post facto clause.[8/]

Indeed, in Weaver v. Graham, 450 U.S. 24 (1981), this Court examined the change of rules governing gain-time in terms of an "opportunity to shorten his time in prison simply through good conduct." Id. at 34. Weaver established that whether the grant or denial of early release is a matter of grace or a "vested right" has no bearing on ex post facto clause analysis. A reduction in the opportunity for release imposed after the commission of a crime is constitutionally impermissible. It was Mr. Welsh's opportunity to be released on parole purely on the basis of his good conduct and rehabilitation which was jeopardized by the 1973 law.

In Weaver, 450 U.S. at 32, this Court also cited with approval Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979), in which the circuit court ruled a change in the timing of parole hearings so impaired parole eligibility as to constitute an ex post facto violation, and stated: "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the

---

8/ In its amicus brief the state of New Mexico argues that changes in parole criteria are merely procedural, because parole changes only the location of the service of a prison sentence (Amicus Brief at 3), citing Alvarado v. McLaughlin, 486 F.2d 541 (4th Cir. 1973). Warden v. Marrero refutes this contention and, indeed, Alvarado was remanded for reconsideration in light of Marrero in McLaughlin v. Priesto, 418 U.S. 903 (1974).

defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Weaver v. Graham, 450 U.S. at 32.

The amicus cites Portley v. Grossman, 444 U.S. 1311 (1980), as upholding a change in parole decision making factors. (Amicus Brief at 2.) But Portley was not a decision of this court. It was a decision of Justice Rehnquist, acting as Circuit Justice, denying a stay of the Ninth Circuit's mandate in the case. The underlying decision was subsequently vacated by this Court and remanded for reconsideration in light of Weaver. Portley v. Grossman, 450 U.S. 962 (1981), remanding Portley v. Grossman, 605 F.2d 563 (9th Cir. 1979).

To add a second string to his bow, petitioner argues, for the first time, that the 1973 law does not prohibit the Parole Board from granting parole even if it finds that release would deprecate the seriousness of the offense. (Petition at 17.)[9/] The petitioner cites no case authority for this proposition. The statutory language is straightforward and refutes this assertion. The statute states the "Board shall not parole a person eligible for parole if it determines that . . . (2) his release at that

---

9/ The Prisoner Review Board Rules upon which petitioner relies for this proposition (Pet. 17) do not support petitioner's contention that the rules create a balancing standard. The rules state "the parole board shall not parole a candidate if it determines that" - and then lists several criteria. "B" states "Release of the candidate would deprecate seriousness of the offense or promote disrespect for the law based on one or more of the following factors: 1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy. 2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes." State of Illinois, Prisoner Review Board, Rules Governing Parole, Rule V B, 3 Ill. Admin. Reg. Issue 1 at 154 (1979).

time would deprecate the seriousness of his offense or promote disrespect for the law." (Emphasis supplied.) Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2) (1973).

The petitioner's argument that there was unlimited discretion in the Parole Board both before and after 1973 is not supported by the statutes involved. The statutes, both in 1962 and 1973, set standards for parole decision making. The standards are different and the 1973 standards make parole more difficult to obtain. The petitioner's argument is, therefore, in many ways a disguised reargument that parole is not a vested right but a matter of clemency and grace. This Court has established beyond dispute that a change in standards that narrows the discretion of the decision-making authority and thereby reduces a prisoner's opportunity for parole cannot be ignored simply because there is no entitlement to parole. Weaver v. Graham, 450 U.S. at 29-30 (1981).

3. The Pre-Weaver Illinois Cases Do Not Support The State's Construction Of The Parole Statutes.

The petitioner contends that Illinois case law establishes that general deterrence was a factor considered in the granting of parole in 1962. Petitioner cites two Illinois appellate court cases, both of which were rejected as erroneously decided by the Seventh Circuit, Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980); and People v. Harper, 27 Ill.App.3d 406, 327 N.E.2d 91 (5th Dist. 1975). Neither case states that general deterrence was a factor considered in reaching parole decisions in 1962.

Harris and Harper were both decided prior to Weaver v. Graham. They involved challenges to the 1973 parole statute. Both held the ex post facto clause was not

violated by the change in Illinois law. The decision in Harris was premised upon the rationale that parole was not a vested right. Weaver is clear in establishing that this analysis may not be applied to cases involving ex post facto clause challenges. 450 U.S. 24, 29-30 (1981). Harper, an earlier decision by the same court, was published as a one paragraph abstract opinion which contained no analysis of the change in the law and can be presumed to suffer from the same analytical fault as the court's later decision in Harris.[10/]

Moreover, the Seventh Circuit was required to make its own analysis of the statutory changes. This Court has made it clear that both the decision whether the standards of punishment set up before and after the offense differ and the decision whether the change violates the federal Constitution's ban against imposition of ex post facto laws are matters for resolution by the federal courts. Lindsey v. Washington, 301 U.S. 397, 400 (1937).

In Weaver v. Graham, 450 U.S. at 33, this Court reiterated the rule that "[w]hether a restrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." (Citing Lindsey with approval.) Indeed, in both Lindsey and Weaver v. Graham, this Court rejected interpretations by the Supreme Courts of the states of Washington and Florida, respectively. Both courts had held that statutes retrospectively affecting prison terms were no more onerous than their predecessors.

10/ The petitioner also cites two federal court decisions from the Northern District of Illinois. United States ex rel. Overall v. Director, (unpublished opinion), No. 74 C 2541 (N.D.Ill.), aff'd without opinion, 513 F.2d 634 (7th Cir. 1975), was decided prior to Weaver v. Graham; Ware v. Kaufman, (unpublished opinion), No. 80 C 3209 (N.D.Ill. 1981), was reversed on rehearing after the Seventh Circuit rendered its decision in this case. Ware v. Kaufman, No. 80 C 3209 (March 16, 1982) (See Memorandum opinion dated June 3, 1982, Appendix B to this brief).

The state's bald assertion that the Seventh Circuit has usurped the state's authority under the Tenth Amendment to the United States Constitution (Petition at 14, 19, 25, 29-31), or otherwise, is without legal support.

B. THERE IS NO CONFLICT WITH ANY DECISION OF OTHER CIRCUITS.

The petitioner asserts that the decision in this case is in conflict with the District of Columbia circuit court decision in Warren v. United States Parole Commission, 659 F.2d 183 (1981), cert. denied, 102 S.Ct. 1454 (1982). (Petition at 26-29). There is no such conflict. Warren, and several cases from other circuits, including the Seventh Circuit, have addressed the question of whether retrospective application of changed federal adult parole laws violated the ex post facto clause.[11/] Two federal adult parole statutes entirely different from the Illinois laws were examined to reach the conclusion in these cases that there was no ex post facto clause violation.[12/] The decisions that pertain to the federal adult parole law changes are inapposite.

Prior to 1973, the United States Parole Board operated pursuant to the statutory mandate contained in 18 U.S.C. §4203(a) (1964), which provided in relevant part that if the Parole Board determines:

11/ Rifai v. United States Parole Comm'n, 586 F.2d 695 (9th Cir. 1978); Ruip v. United States, 555 F.2d 1331 (6th Cir. 1971); Zeidman v. United States Parole Comm'n, 593 F.2d 806 (7th Cir. 1979); Farmer v. United States Parole Comm'n, 558 F.2d 54 (4th Cir. 1978), cert. denied, 442 U.S. 943 (1979).

12/ But see Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). (The court held that mechanical application of 1973 federal parole guidelines to bar parole before a specified period and to deny individual treatment was a violation of the ex post facto clause. See discussion of Geraghty in United States v. Ferri, 652 F.2d 325, 327-28 (3d Cir. 1981).)

> a prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (Emphasis supplied.)

In 1973, the Parole Board promulgated guidelines for parole release. The guidelines grouped offenses by category of severity and provided for assigning a salient factor score to each prisoner. The salient factor score was based on the individual prisoner's history and predictions about recidivism. A table combined the salient factor score and the offense severity factor to yield a suggested range of time to be served prior to release or parole.

In 1976, Congress passed the Parole Commission Reorganization Act of 1976. Pub. L. No. 94-233, 90 Stat. 219 (codified at 18 U.S.C. §4201 et seq. (1976)). It replaced the old parole eligibility statute, §4203 (quoted above), with 18 U.S.C. §4206 (1976). The new law included a criterion:

> "(a) (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law"

However, subsection (c) of §4206 specifically provides that the "Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing."

In Warren v. United States Parole Commission, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1454 (1982), the court of appeals ruled that the 1976 federal law did not run afoul of the ex post facto clause as applied to Warren.[13/] Warren had committed two crimes while on parole

---

13/ Other federal cases have rejected challenges to the federal guidelines because they are not "laws" within the meaning of the ex post facto clause. E.g., Zeidman v. United States Parole Comm'n, 593 F.2d 806, 808 (7th Cir. 1979); Ruip v. United States, 555 F.2d 1331, 1335-36 (6th Cir. 1977).

release. He was contesting application of the guidelines to consideration of reparole.

The Warren court specifically noted that the new federal statute grants the Commission power to ignore the statutory guidelines for good cause. The old statute similarly placed no express or implied limits on the Parole Board's discretion.

The Illinois statutes both old and new are significantly different from the parole statutes at issue in Warren. The Illinois 1962 criteria were to be used to determine whether the prisoner would remain non-violent and was rehabilitated. The Illinois 1962 statute and regulations required release if the enumerated criteria were met. (See discussion supra at pp. 5-8.) The early federal statute said if criteria are met the Board "may in its discretion" grant parole.

In direct opposition to the Illinois 1962 law, the 1973 Illinois statute requires denial of parole for the enumerated reasons. It does not leave the Parole Board any discretion. (See discussion supra at pp. 8-12.) The new 1976 federal statute provides for a grant or denial of parole, notwithstanding the guidelines, for good cause. 18 U.S.C. §4206(c)(1976).

Indeed, if the Illinois statutes at issue here are to be compared with other statutes, federal statutes with greater similarity to Illinois' are at hand. The 1962 Illinois statute involved in this case more closely parallels the statute considered in Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977). Shepard committed a crime in 1972. The Second Circuit held the parole commission could not apply 1976 parole laws to this Youth Corrections Act prisoner. The Youth Corrections Act listed several criteria which were

to be considered in determining whether to grant parole. The court found a focus on general deterrence conspicuously absent from the enumerated criteria. Shepard 556 F.2d at 653. In referring to the old statute, the court stated:

> This, of course, did not eliminate the important concern to protect the public from the rampages of youthful criminals. It did mean, however, that the decision to release a young offender had to be based on whether he would err again (specific deterrence of the sentenced individual) rather than on whether others would be more prone to commit antisocial acts if the youth were released before the expiration of his maximum term (general deterrence) or whether society had accorded the youth his "just desserts." (retribution). 556 F.2d at 653. (Citations omitted.) (Emphasis in original.)

The only circuit courts which have considered the ex post facto clause challenge to the change in standards applicable to parole for those sentenced under the Youth Corrections Act have accepted the Shepard analysis.[14/] The agreement of the courts is based on their unanimous opinion that the question of whether the changes impose an unlawful retrospective burden requires close individualized analysis of the particular statutes at issue. In fact, in Rifai v. United States Parole Commission, 586 F.2d 695, 699 (9th Cir. 1978), which upheld the federal adult parole statute against an ex post facto challenge, the court acknowledged the propriety of the decision in Shepard, but found it distinguishable. The ex post facto clause analysis must be made by examining the specific statutes and the effect changes contained in them have on eligibility for parole.[15/] This case does not and cannot create a conflict in the circuits.

14/ Marshall v. Garrison, 659 F.2d 440 (4th Cir. 1981); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978).

15/ For this reason, the Amicus' argument that New Mexico is directly affected by the Seventh Circuit's decision is erroneous. The change in the terms of the New Mexico statute must be separately examined to determine whether they violate the ex post facto clause. The Amicus does not cite to the statutory changes which are involved.

Moreover, this Court has twice deferred consideration of the question whether the retrospective application of the new federal adult parole law violates the ex post facto clause. United States v. Addonizio, 442 U.S. 178, 184 (1978); United States Parole Commission v. Geraghty, 445 U.S. 388, 390 n. 1 (1980). In addition, this Court remanded Portley v. Grossman, 450 U.S. 962 (1981), which also raised this issue, for further consideration in light of Weaver v. Graham, 450 U.S. 24 (1981). The Court has, therefore, recently indicated its preference for allowing the circuit courts to further develop the law in this area. This case, which revolves around two entirely different Illinois statutory provisions, does not present the proper vehicle for an evaluation of the constitutionality of the federal adult parole law.

C. THE SEVENTH CIRCUIT DECISION CREATES NO HARDSHIP ON THE STATE OF ILLINOIS NOR ANY POTENTIAL FOR DANGER TO SOCIETY.

The decision of the Seventh Circuit in this case does not require release of Mr. Welsh or of any other prisoner, as suggested throughout the Petition. It requires an application of parole guidelines in effect from 1962 to 1973 for those persons who committed crimes during that period. The parole rehearings can, in compliance with the Welsh decision, consider the prisoner's record, including the seriousness of the offense, in the context of determining whether the prisoner is rehabilitated and no longer a danger to society if released. The prisoners who are affected by the Welsh decision are all prisoners who by statute are eligible for parole. There is and can be no parade of horribles. The burden upon the state in holding parole hearings under standards it previously applied is insignificant in light of the Constitutional violation. "So much importance did the [C]onvention attach to [the ex post facto

prohibition], that it is found twice in the Constitution." (U.S. Const. Act I, §9, Cl. 3; Art. I, §10, Cl. 1.) Kring v. Missouri, 107 U.S. 221, 227 (1883) (quoted in Weaver v. Graham, 450 U.S. 24, 28 n. 8).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Jerold S. Solovy
Laura A. Kaster
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent, Gary Welsh

Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Of Counsel

Dated: July 14, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

DOCUMENT NUMBER_____
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
MAY - 4 1982

GARY WELSH,

Petitioner,

-vs-

LARRY MIZELL, Warden, Vienna Correctional Center, Vienna, Illinois, and TYRONE FAHNER, Attorney General of the State of Illinois,

Respondents.

No. 80 4104

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Seventh Circuit, which was issued to this Court on April 9, 1982, in the case of Welsh v. Mizell, No. 80-1862, and in which the Seventh Circuit on January 12, 1982, ruled (1) that Mr. Welsh's constitutional right to be free from ex post facto laws was being violated by the way that the Illinois Prison Review Board was denying him parole and (2) that the proper remedy was to remand the case to the Illinois Prison Review Board for reconsideration of his parole under the relevant and constitutionally proper standards

IT IS HEREBY ORDERED that this case is remanded to the Illinois Prison Review Board for prompt reconsideration of Mr. Welsh's parole application under the statutes and regulations in effect in 1962, the year that Mr. Welsh committed the offense for which he is incarcerated; and

IT IS FURTHER ORDERED that the Prison Review Board at that prompt rehearing apply the standard in effect in 1962 as articulated in Sections 6 and 7b of the Parole Law and the underlying regulations (Ill. Rev. Stat. Ch. 38, Sec. 806, 808a (1961); Cf. Ill. Rev. Stat. Ch. 127, Sec. 55b (1961) and determine whether Mr. Welsh's conduct and other allowable criteria have demonstrated his rehabilitation and his ability again to become a law-abiding citizen. Welsh v. Mizell, 668 F.2d 328, 330 (7th Cir. 1982).

DATED: This 4th day of April, A.D. 1982.

W. J. Beatty

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

mod 5-4-82

APPENDIX B

OFFICE COPY

FILED
MAR 16 1982
STUART CUNNINGHAM, U. S. DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK WARE and
ELIZABETH WARE,

Plaintiffs,

v.

No. 80 C 3209

K.V.KAUFMAN, IRVING R. JAMES
and GAYLE FRANZEN,

Defendants.

MEMORANDUM OPINION

On October 13, 1981, in granting the defendants' motion to dismiss the plaintiffs' section 1983 complaint, we held, inter alia, that the retrospective application of Ill.Rev.Stat., ch.38, §1003-3-5(c)(2) to deny to the plaintiffs parole on the basis of the seriousness of their offenses did not violate the ex post facto clause. The plaintiffs filed a motion to reconsider.

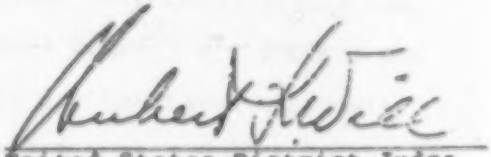
Subsequent to our initial decision, the Seventh Circuit held that retrospective application of the general deterrence criteria in section 1003-3-5(c)(2) does violate the constitution. Welsh v. Mizell, 80-1852 (Jan. 12, 1982). We therefore vacate that portion of our opinion and judgment in this case which dealt with the application of section 1003-3-5(c)(2)

to deny parole to the plaintiffs. We also grant a declaratory judgment that the plaintiffs' constitutional rights were violated when parole was denied on the basis of the seriousness of their offenses and that they are entitled to new parole hearings within a short period of time at which the defendants will apply the statute and regulations that were in effect in 1969 when the plaintiffs committed their crimes, not the statute and regulations subsequently enacted.

The plaintiffs also ask for damages for that violation of their constitutional rights. The defendants, however, are entitled to a good faith defense in an action for damages under section 1983. In denying the plaintiffs parole on the basis of section 1003-3-5(c)(2), the defendants were simply applying a statute passed by the legislature and following the normal procedure of the Illinois Prisoner Review Board. Moreover, the reasonableness of the defendants' belief that their actions were constitutional is indicated by our initial decision upholding their actions and the initial decision of the district court in Welsh v. Mizell which the court of appeals subsequently reversed. At the time the defendants' denied parole to the plaintiffs, there was no decision that application of section 1003-3-5(c)(2) to prisoners convicted before its enactment violated the ex post facto clause, and the defendants are not responsible for reasonably failing to anticipate the decision in Welsh v. Mizell. That subsequent decision does not operate

retroactively to render the defendants' actions in bad faith. As a matter of law, therefore, the plaintiffs are not entitled to recover damages.

For the reasons stated above, we grant in part the plaintiffs' motion to reconsider and vacate our opinion of October 13, 1981, insofar as it dismisses the plaintiffs' claim relating to the retrospective application of section 1003-3-5(c)(2). We also enter a declaratory judgment that the decisions to deny parole to the plaintiffs based on the seriousness of their offenses violated the ex post facto clause and that the plaintiffs are entitled within a short period of time to a new parole hearing and decision in accordance with the Seventh Circuit's decision in Welsh v. Mizell. The plaintiffs' claim for damages, however, is denied. An appropriate order will enter.



United States District Judge

DATED: MAR 1 0 1982

Supreme Court, U.S.
FILED
JUL 20 1982
Alexander L. Stevas, Clerk

NO. 81-2105

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden, Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent, Gary Welsh, by his attorneys, JENNER & BLOCK, hereby moves for leave to file the accompanying Brief in Opposition to Certiorari pursuant to Rule 46 and to proceed in forma pauperis.

In support of this Motion, Respondent states that he proceeded pro se in the district court. His counsel was appointed by the Court of Appeals for the Seventh Circuit purusant to the Criminal Justice Act. 18 U.S.C. §3006(A). The necessary costs already having been paid, a motion to proceed in forma pauperis was denied. The Respondent cannot afford the costs of the printing or reproduction of this brief and respectfully requests that the Court grant this motion. No affidavit in support of this motion is required pursuant to 18 U.S.C. §3006(A)(D) and Supreme Court Rule 46.1.

GARY WELSH, Respondent

By Laura A. Kaster
One of his Attorneys

Jerold S. Solovy
Laura A. Kaster
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Supreme Court, U.S.
FILED
JUL 20 1982
Alexander L. Stevas, Clerk

NO. 81-2105

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LARRY MIZELL, Warden, Vienna Correctional Center,

Petitioner,

vs.

GARY WELSH,

Respondent.

MOTION TO STRIKE MATERIAL IN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Gary Welsh, by his attorneys, JENNER & BLOCK, hereby moves to strike Appendix E (Petition at 29a-34a) from the Petition for Writ of Certiorari. The material contained in Appendix E was not submitted to the district court. It was rejected for filing by the court of appeals when the Petitioner attempted to file the material after referring to it in oral argument. (Order of court of appeals dated October 28, 1981, appended hereto as Exhibit A.) The affidavit which the State submits contains material inaccuracies and inferences which are subject to dispute. The court of appeals specifically ruled that these materials "are not suitable for judicial notice in this appeal." This material is not properly before this court and should be stricken pursuant to Rule 34.6 of the Supreme Court Rules.

The Respondent also moves to strike the Petitioner's erroneous statements that he was convicted of rape. (Petition

for Writ of Certiorari pages 1, 14.) The Respondent was acquitted on the charge of rape, People v. Welsh, 30 Ill.App.3d 887, 887-88, 333 N.E.2d 572, 573 (1975). The Petitioner's references to Respondent's conviction or commission of rape are improper and prejudicial, and should, therefore, be stricken.

GARY WELSH, Respondent

By Laura A. Kaster
One of his Attorneys

Jerold S. Solovy
Laura A. Kaster
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 28, 19 81

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. _____

Hon. _____

GARY WELSH,
Petitioner-Appellant,

No. 80-1862 vs.

LARRY MIZELL, Warden,
Vienna Correctional Center,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division.
No. 80-C-4104
Judge William L. Beatty

This matter comes before the court for its consideration upon the "PETITIONER-APPELLANT'S OBJECTION TO THE STATE'S MOTION FOR LEAVE TO FILE" filed herein on October 2, 1981, by counsel for the petitioner-appellant. Treating this objection as a motion to reconsider this court's order of October 1, 1981,

IT IS ORDERED that said motion is hereby GRANTED. Upon reconsideration,

IT IS ORDERED that the respondent-appellee's motion for leave to file an affidavit and exhibit relating to the parole board's denial of parole is hereby DENIED, since the materials tendered are not suitable for judicial notice in this appeal.

89-000—10 0-79 00 0000

EXHIBIT A

Office - Supreme Court, U.S.
FILED
SEP 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MIZELL,
Warden, Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Petitioner

RONALD LEE BELL
Assistant Attorney General
Of Counsel

Printed by the Authority of the State of Illinois

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines permitting denial of parole based upon the "seriousness of the offense" in a manner inconsistent with the ex post facto clause of the Constitution, where a prior statute granted Illinois parole authorities unfettered discretion in issuing paroles.

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT:	
I.	
The Tenth Amendment Protects The State Of Illinois From The Unauthorized Acts Of Federal Courts As Well As Of Congress And Needs No Further "Legal Support" Beyond The Terms Of That Provision	1
II.	
Where, As Conceded By Respondent, The Illinois Parole Authorities Have Always Had The Right To Consider The Seriousness Of The Offense, The Court Of Appeals Improperly Infringed Upon The State Prisoner Review Board's Discretion By Limiting The Board's Consideration Of This Factor When Considering An Application For Parole	4
III.	
The Statute In Question Does Not Violate The *Ex Post Facto* Clause Where, When Viewed As A Whole, It Provides Substantial Benefits Not In Existence In 1962	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Aswander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	6
Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978)	8
Chowell v. Benson, 385 U.S. 22 (1932)	6
Dobbert v. Florida, 432 U.S. 282 (1971)	8
Engle v. Isaac, ... U.S. ....., 102 S.Ct. 1558 (1982)	3
Guzman v. Morris, 644 F.2d 1295 (9th Cir. 1981)	8
Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981)	3
In re Evans, 452 F.2d 1236 (D.C. Cir. 1971)	6
Lindsey v. Washington, 301 U.S. 397 (1937)	2
National League of Cities v. Usery, 426 U.S. 833 (1976)	3
Overall v. Director, No. 74 C 2541 (N.D. Ill. 1974) *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975)	6
People v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964)	4
United Transportation Union v. Long Island R.R. Co., 455 U.S. ....., 102 S.Ct. 1349 (1982)	3
Valley Forge College v. Americans United, ... U.S. ....., 70 L.Ed.2d 700 (1982)	1, 2
Weaver v. Graham, 450 U.S. 24 (1981)	2, 4, 5, 8
Welsh v. Mizell, 668 F.2d 338 (7th Cir. 1982)	*passim*

CONSTITUTIONAL PROVISIONS:

United States Constitution, Tenth Amendment 1

STATUTES:

Ill. Rev. Stat. 1962, ch. 38, § 801 8
Ill. Rev. Stat. 1962, ch. 38, § 807 4
Ill. Rev. Stat. 1973, ch. 38, § 1003-3-3 9
Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) 4, 5, 6
Ill. Rev. Stat. 1973, ch. 38, § 1003-6-3 ..... 8, 9

MISCELLANEOUS:

T. Gregory, *Parole*, 35 Chicago Bar Record 7 (1953) 5
Theodore P. Fields, *Illinois Parole and Pardon Adult Parole Decision*, 62 Ill. B.J. 20 (1973) 4, 5
C. Sand, *Sutherland on Statutory Construction*, 4th ed. (1973) 6
Gibbs, *Crime, Punishment, Deterrence* (1976) 6
Regulation 526, Illinois Department of Corrections, Administrative Regulations (Feb. 1, 1978) 8
State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (October 1962; effective June 1, 1962) 9
Prisoner Review Board, *Rules Governing Parole* (1978) 6

In The

Supreme Court of the United States

October Term, 1981

LARRY MIZELL,
Warden, Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

THE TENTH AMENDMENT PROTECTS THE STATE OF ILLINOIS FROM THE UNAUTHORIZED ACTS OF FEDERAL COURTS AS WELL AS OF CONGRESS AND NEEDS NO FURTHER "LEGAL SUPPORT" BEYOND THE TERMS OF THAT PROVISION.

The sole defense which the respondent makes to petitioner's claim of a Tenth Amendment violation is to assert that the argument "is without legal support." Resp. Br. at 14. The Tenth Amendment, like all provisions of the Constitution, is self-executing and needs no judicial or legislative imprimatur to effect its purpose. The language of that provision clearly states the principle that rights not granted to the federal government are reserved by the states. The right to rewrite state parole schemes in the manner undertaken by the court of appeals in this case, in direct contradiction to the manner in which it has allowed the federal system to operate, is clearly not a right derived from any provision of the Constitution and is thus properly reserved to the states.

The respondent's failure to answer petitioner's Tenth Amendment argument is moreover symptomatic of his and the court of appeals' persistent attempt to treat the petitioner like any other litigant in the federal court. The opinion below, decided on the allegations of the petition without any remand for the true facts, completely fails to recognize the petitioner's status as the representative of a sovereign government whose laws are to be overturned only in the most exceptional circumstances. The power of the federal courts "to declare the rights of individuals and to measure the authority of governments . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Valley Forge College v. Americans United*, ... U.S. ....., 70

L.Ed.2d 700, 708 (1982). The allegations of a habeas corpus petition, unsupported by an evidentiary hearing and easily rebutted by reference to available records (see Appendix E of the Petition for Writ of Certiorari), cannot logically be called such exceptional circumstances.

It is obvious that both the petitioner and the court of appeals wish that Illinois' parole law had been drafted in a manner more consonant with their particular views of propriety and justice. But as this Court has recently observed, "the federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge College*, 70 L.Ed.2d at 719. The right to reconstruct those parole laws absent a legitimate constitutional defect is not a right granted to the federal court by the Constitution; it is a right reserved to the State of Illinois.

Petitioner's disregard for basic concepts of federalism is further evidenced by his argument that federal questions must be decided by federal courts. Resp. Br. at 13. The principal cited authority, *Lindsey v. Washington*, 301 U.S. 397 (1937), does not contain any such ruling. That case was a proceeding to review on certiorari a decision of the Supreme Court of Washington. Petitioner's alternate authority, *Weaver v. Graham*, 450 U.S. 24 (1981), suffers from the same deficiency: no federal court was involved in this Court's review of a decision of the Florida Supreme Court and there was consequently no ruling whatsoever on the priority of federal court review relative to state court consideration of federal questions.

Of course, the determination of an *ex post facto* claim involves the decision of a federal question, but as respondent's authorities demonstrate, contrary to petitioner's claim, it need not involve a federal court. Article III courts enjoy no monopoly in the consideration and determination of federal constitutional questions. As this Court has recently observed, "The States possess primary au-

thority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, ... U.S. ...., 102 S.Ct. 1558, 1571 (1982).

The recent decisions of this Court which have recognized the continued viability of the Tenth Amendment are numerous and include *National League of Cities v. Usery*, 426 U.S. 833 (1976), *United Transportation Union v. Long Island R.R. Co.*, 445 U.S. ....., 102 S.Ct. 1349 (1982) and *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264 (1981).

A congressional enactment violates the Tenth Amendment if it (1) regulates "the States as States", (2) addresses "matters that are indisputably 'attribute[s] of state sovereignty,'" or (3) "directly impair[s] [the State's] ability to 'structure integral operations in areas of traditional governmental functions.'" *Hodel*, 452 U.S. at 287-288, quoting *National League of Cities*, 426 U.S. 854 at 852. It must be obvious that the federal courts, which are created and invested with such jurisdiction as they may have by Congress, can have no greater right to legislate policy for the states than does the Congress. The opinion of the Seventh Circuit undeniably addresses a subject matter, the enforcement of the criminal law, which is undisputably an "attribute of state sovereignty." Equally clear is the fact that the State of Illinois' ability to structure an integral operation, the parole system, in an area of traditional governmental functions has been significantly infringed. As noted above, all of this has been accomplished without benefit of an evidentiary hearing or other opportunity for the State to prove the merits of its claim. If the State of Illinois has not reserved this minimal right, to be free from such arbitrary action, in the Tenth Amendment, then there must be very few rights indeed embodied in that constitutional guarantee.

II.

WHERE, AS CONCEDED BY RESPONDENT, THE ILLINOIS PAROLE AUTHORITIES HAVE ALWAYS HAD THE RIGHT TO CONSIDER THE SERIOUSNESS OF THE OFFENSE, THE COURT OF APPEALS IMPROPERLY INFRINGED UPON THE STATE PRISONER REVIEW BOARD'S DISCRETION BY LIMITING THE BOARD'S CONSIDERATION OF THIS FACTOR WHEN CONSIDERING AN APPLICATION FOR PAROLE.

Respondent concedes that the "severity of the offense" criteria was a consideration under the 1962 parole scheme which was in effect when respondent committed the murder for which he is now incarcerated. Resp. Br. at 8. Indeed, parole in Illinois has never been automatic. *Compare* Ill. Rev. Stat. 1962, ch. 38, § 807, *with* Ill. Rev. Stat. 1977, ch. 38, § 1003-3-5(c)(2). Once respondent became eligible for parole, his parole was subject to the discretion of the parole authorities. *Id.*; *People v. Kinney*, 30 Ill. 2d 201, 195 N.E.2d 651 (1964); Fields, *Illinois Parole and Pardon Adult Parole Decision*, [hereinafter referred to as Fields] 62 Ill. B.J. 20, 21 (1973).

Therefore, what is in issue, in the instant case, is the Prisoner Review Board's discretionary denial of respondent's parole, not respondent's eligibility for parole. The court of appeals has thus impermissibly intruded into the realm of the Prisoner Review Board's discretion. The Court intruded by limiting, if not completely eliminating, the Review Board's ability to consider a factor, the seriousness of the offense, which, as now conceded by the respondent, has always been subject to consideration. See Resp. Br. at 8.

The vehicle by which the Seventh Circuit entered into the realm of state discretion was *Weaver v. Graham*, 450 U.S. 24 (1981). *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) (See Appendix A of the Petition for Writ of Certiorari). The

Weaver case dealt with gain time, an automatic calculation, which does not involve the exercise of a discretionary function. *Weaver* cannot logically be utilized in such a way as to impinge upon a state parole board's discretion to grant or deny parole. This Court must keep in mind that the Prisoner Review Board was not required to find anything with regard to respondent's crime. Furthermore, the seriousness of the offense, as petitioner has always maintained, was considered by the parole board prior to 1973.

In fact, one commentator, *in 1953*, stated, with regard to the parole scheme that was still in effect in 1962, that:

> [The board] may determine for one reason or another that an inmate should not be released at the minimum perhaps because of his previous *criminal record* or the *character of his crime*, or the opinion of professionals or his conduct in the institution. . . . The issuance of such discharge is within the discretion of the board. . . .

T. Gregory, *Parole* 35 Chicago Bar Record 7, 10 (1953) (emphasis added). Furthermore, in 1973, another authority stated:

> The statute (Ill. Rev. Stat. 1973, ch. 38 § 1003-3-5(c)) sets forth the general criteria for denying parole that have been followed by the board for some time.

Fields, *supra* at 21.[1] Therefore, the Parole Board, in 1962, could have based a parole decision on an inmate's criminal record or the character of his crime. *Id.*

The 1973 statute does not have an *ex post facto* effect. The statute provides, in pertinent part, that parole shall be denied if the board finds that an inmate's:

> [R]elease at that time would deprecate the seriousness of *his* offense or promote disrespect for the law.

---

[1] The Fields article was cited by the court of appeals for a different proposition. (*See Welsh* at 331, fn.3).

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) (emphasis added). The statute does not state *to whom* it would "deprecate the seriousness of his offense or promote disrespect for the law." *Id.* Assuming for the sake of argument that general deterrence could not, as the court of appeals held, be considered, then it would be implicit that the statute is directed to the individual parole applicant, as courts are required to interpret statutes whenever possible to avoid significant constitutional difficulties. *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Chowell v. Benson*, 285 U.S. 22, 62 (1932); *See also*, C. Sand, *Sutherland On Statutory Construction*, § 45.11 (4th ed. 1973). This interpretation would save the statute from being unconstitutional. It would not be *ex post facto* because special deterrence and prevention of recidivism have always been major concerns in parole determinations. *See* Petition for Writ of Certiorari at 17-21. *See generally* Gibbs, *Crime, Punishment, Deterrence* (1976) at 67. The focus on special deterrence and recidivism is evident by the fact that the Board is required to consider not only the character of the crime but also the aggravating and mitigating circumstances in determining whether the prisoner is fit to be released on parole. Prisoner Review Board, *Rules Governing Parole* (1978) Rule V(B). Therefore, assuming that general deterrence could not be considered, the 1973 statute is not unconstitutional as it does not alter the Board's essential balancing process through which it exercises its discretion.

However, petitioner is not conceding that general deterrence was not considered under the 1962 parole scheme. In fact, in *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975), a case decided in closer proximity to the change in the statutes, it was specifically noted that general deterrence was considered. See Petition for Writ of Certiorari, Appendix G at 46a-47a.

Although respondent now concedes that seriousness of the offense was a consideration under the old parole statute, that is not to say that courts will not interpret *Welsh* as precluding the consideration of the seriousness of the offense in denying parole. In *Ware v. Kaufman*, No. 80 C 3204 (N.D. Ill. 1981), cited in Appendix H to the Petition for Writ of Certiorari at 53a, the district court originally held that the statute was not *ex post facto*. *Id.* at 58a-60a. However, believing itself bound by the *Welsh* case, that court in an opinion contained in Appendix B of Respondent's Brief in Opposition subsequently held that:

> [T]he decisions to deny parole to the plaintiffs *based on the seriousness of their offenses violated the ex post facto clause* . . . . and that the plaintiffs are entitled within a short period of time to a new parole hearing and decision in accordance with the Seventh Circuit's decision in *Welsh*. . . . *Id.* at 5a (Emphasis added).

That district court failed to make the distinction that respondent makes between the "seriousness of the offense" factor as it relates to rehabilitation or otherwise. Rather that factor was completely banished from any further parole consideration. Respondent's "concession" is, therefore, illusory.[2]

Thus, the preclusion or severe limitation of the consideration of this factor that has always been considered by the parole authorities makes it imperative that this Court grant certiorari.

---

[2] One can presume that upon the preclusion from the consideration of the seriousness of his offenses, the review board was compelled to release Mr. Ware, who was serving a concurrent sentence of 25-30 years for aggravated kidnapping and 10-20 years for rape.

III.

THE STATUTE IN QUESTION DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE WHERE, WHEN VIEWED AS A WHOLE, IT PROVIDES SUBSTANTIAL BENEFITS NOT IN EXISTENCE IN 1962.

In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court held that the critical question in determining whether a law contravenes the *ex post facto* clause is "whether the new provision imposes greater punishment after commission of the offense." 450 U.S. at 32 n.17. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law. *Dobbert v. Florida*, 432 U.S. 282, 294 (1971); *See also Guzman v. Morris*, 644 F.2d 1295 (9th Cir. 1981); and *Breest v. Helgemoe*, 579 F.2d 95 (1st Cir. 1978). Further, the two statutory schemes must be compared *in toto* to determine if the new law may be fairly characterized as more onerous. *Dobbert*, 432 U.S. at 296-298; *Breest*, 579 F.2d at 103.

Unlike the situation in *Weaver v. Graham*, 450 U.S. 24 (1981), the 1973 statute held to be *ex post facto* in *Welsh*, provides more than mere illusory benefits to parole applicants. Nondiscretionary, compensatory good time, allowing for *90 days reduction from sentence* for every year served is provided. *See Ill. Rev. Stat.* ch. 38, § 1003-6-3 (1973) and Regulation 526, Illinois Department of Corrections, Administrative Regulations (Feb. 1, 1978). Under 1962 law there was a one third limit on the amount of credit to be granted against the maximum sentence. In 1973, the limitation on the amount of credit to be applied to the maximum sentence was dropped.

In addition, parole eligibility under the 1973 statute is much earlier than in 1962. For example, in 1962, Mr. Welsh was required to serve his minimum sentence of 60 years less good time which computes to *31 years and 3 months*, before he would have been eligible for parole. *Ill. Rev. Stat.* 1962, ch. 38, § 801. *See* State of Illinois, Depart-

ment of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (1962) at 52 (for computation of good time credits) (hereinafter cited as *Rules Governing Parole*, 1962). However, in June of 1962, a regulation was enacted which fixed the *earliest* eligibility date to Mr. Welsh, a person who had a 60 year minimum sentence, as being *20 years*. *Rules Governing Parole*, 1962 at 17.

In 1973, in conjunction with the provision at issue, the legislature enacted *Ill. Rev. Stat.*, ch. 38, § 1003-3-3 allowing for eligibility in 20 years *less good time* to a person such as Mr. Welsh, who had a 60 year minimum sentence. With this new good time allowance, Mr. Welsh became eligible for parole in 11 years and 3 months. Furthermore, the 11 year and 3 month eligibility gained under the 1973 statute was further reduced by the previously mentioned provision for compensatory good time. (i.e., 90 days for every year served.) *Ill. Rev. Stat.* 1973, ch. 38, § 1003-6-3.

Therefore, respondent is in error in his contention that the 1973 law impaired parole eligibility. See Resp. Br. at 8. However, even if it is assumed that the promulgation of the "seriousness of the offense" criterion constitutes an increase in penalty, respondent has no constitutional entitlement to selectively choose the most favorable provision of separate parole schemes when the later scheme, considered *in toto*, does not increase his punishment. But for the enactment of the parole scheme which petitioner now challenges, he would not have been eligible for parole for 20 years (i.e., at the earliest 1982). The decision of the Seventh Circuit, that respondent may choose those provisions of each scheme which best suit him, is simply an indefensible intrusion by a federal court of appeals into the State of Illinois' legitimate interest in refining and clarifying its parole system.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Petitioner

RONALD LEE BELL
Assistant Attorney General
Of Counsel

September 17, 1982.

Amicus Brief

Office - Supreme Court, U.S.
FILED
JUN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2105

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MITCHELL, WARDEN,

Petitioner,

v.

GARY WELSH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

JEFF BINGAMAN
Attorney General
State of New Mexico
EDDIE MICHAEL GALLEGOS
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 982-6933

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

	Page
THE INTEREST OF THE AMICUS CURIAE	1
THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS JEOPARDIZES THE DISCRETION OF THE NEW MEXICO PAROLE BOARD TO GRANT PAROLE TO A NEW MEXICO STATE PRISONER	2
CONCLUSION	4

TABLE OF AUTHORITIES

FEDERAL CASES CITED:

Alvarado v. *McLaughlin*, 486 F.2d 541 (4th Cir. 1973)	3
Greenholz v. *Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979)	2
Hopt v. *Utah*, 110 U.S. 574 (1883)	2
Portley v. *Grossman*, 444 U.S. 1311 (1980)	2
Weaver v. *Graham*, 450 U.S. 24 (1981)	2, 3
Welsh v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982)	1, 3, 4

SECTIONS CITED:

Section 31-21-25, B, D, NMSA 1978	2
Section 31-22-24 NMSA 1978 (1981 Rep. Pamp)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2105

LARRY MIZELL, WARDEN,

Petitioner,

v.

GARY WELSH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

THE INTEREST OF THE AMICUS CURIAE

The State of New Mexico wants its Parole Board to have discretion in determining whether to grant, deny or revoke the parole of a state prisoner.

The Parole Board of New Mexico uses the "seriousness of the offense" as part of its criteria in determining if parole is to be granted to a New Mexico state prisoner.

The decision in *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) threatens the discretionary powers of the New Mexico State Parole Board.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS JEOPARDIZES THE DISCRETION OF THE NEW MEXICO PAROLE BOARD TO GRANT PAROLE TO A NEW MEXICO STATE PRISONER

Section 31-22-24 NMSA 1978 (1981 Rep. Pamp) creates the New Mexico Parole Board. Section 31-21-25, B, D, *supra*, grants to the New Mexico Parole Board power to adopt such rules, regulations and criteria as may be necessary for the effectual discharge of its duties in determining whether to grant, deny or revoke parole or to discharge a parolee. The Rules and Regulations of the New Mexico Parole Board lists "seriousness of the offense" as one criteria in determining parole for a prisoner.

Greenholz v. *Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1 (1979) held, inter alia, that a state need not establish a parole system and that a state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. Accordingly parole is not a right but an act of clemency. *Greenholz*. *Portley* v. *Grossman*, 444 U.S. 1311 (1980) upheld the discretion of the Federal Parole Commission to change administrative guidelines articulating the factors relied upon in making parole decisions. In *Portley*, at the time the prisoner was eligible for parole, the Parole Commission's guidelines had changed from those in effect at the time the prisoner was sentenced. *Portley* held that such a change did not violate the constitutional prohibition against ex post facto laws. *Weaver* v. *Graham*, 450 U.S. 24 (1981) held that even if a law merely alters penal provisions accorded by the grace of the legislature, it violates the ex post facto clause if it is both retrospective and more onerous that the law in effect on the date of the offense. However, no ex post facto violation occurs if the change was merely procedural and

does not increase the ingredients of the offense or the ultimate facts necessary to establish guilt. *Hopt* v. *Utah*, 110 U.S. 574 (1883); *Weaver*, *supra*. Parole is an extension of the prison walls *Alvarado* v. *McLaughlin*, 486 F.2d 541 (4th Cir. 1973). It follows that parole is merely a procedural or administrative decision of whether to allow a prisoner to serve his sentence either inside or outside the prison walls. Parole changes the location of the sentence but does not change the length.

In *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) the Illinois Prison Review Board, in denying parole to the prisoner, relied upon parole criteria in effect at the time of parole eligibility rather than at the time of the crime. The newer criteria added "seriousness of the offense" as a factor to be considered. *Welsh* reversed the decision of the United States District Court for the Southern District of Illinois, which dismissed the prisoner's petition for writ of habeas corpus, on the grounds that such a change in parole criteria worked a substantial harm to the prisoner and thus violated the ex post facto clause.

The decision in *Welch* is incorrect for three reasons. First, any changes in parole criteria are procedural in nature because such criteria do not increase the length of a sentence but only the location. Second, such criteria do not increase either the ingredients of the crime for which a prisoner is first sentenced or the sentence and do not change the ultimate fact that the prisoner may not yet be rehabilitated enough to finish his sentence outside the prison walls. Third, the *Walsh* court assumed that the prisoner's "exemplary conduct . . . might well have resulted in parole under the older criteria." *Id.* at 331. This is pure speculation.

CONCLUSION

The decision in *Welsh* v. *Mizzell*, 668 F.2d 328 (7th Cir. 1982) is incorrect because a change of parole criteria does not increase the sentence of a prisoner and does not change the fact that a prisoner may not be rehabilitated enough to be allowed to finish his sentence outside the prison walls.

The decision in *Welsh* jeopardizes the ability of states to establish realistic parole criteria for state prisoners.

This Court should grant the Petition for Writ of Certiorari filed by the State of Illinois.

The decision in *Welsh* should be reversed and the decision of the district court affirmed.

Respectfully submitted,

JEFF BINGAMAN
Attorney General
State of New Mexico
EDDIE MICHAEL GALLEGOS
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 982-6939
Attorneys for the Amicus Curiae